UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FARERI ASSOCIATES, LP, GREENWICH PARK, LLC, GREENWICH PREMIER SERVICES CORP., and BRENWOOD HOSPITALITY, LLC, A SINGLE EMPLOYER,	**Cases 01–CA–188158 01–CA–190046 01–CA–191779 01–CA–214016**
and	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ.	

Decision and Recommended Order

DAVID I. GOLDMAN
Administrative Law Judge

Counsel:

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DECISION

INTRODUCTION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. These cases involve four respondents alleged to be a single employer. In November 2016, the employer acquired an office park in Greenwich, Connecticut. Initially, the employer did not hire any of the 21 longtime incumbent union-represented cleaners. Instead, it first hired whatever few inexperienced people that it could find through friends of friends—basically anyone other than the incumbent cleaners—and then continued hiring but ignored the collective efforts of the 21 former cleaners to be considered and hired. Ultimately, eight of the former employees were hired by the employer—through individual efforts that usually included hiding their past unionized experience with the predecessor—and became part of an expanded 33-34 employee complement. However, three of the hired predecessor employees were quickly terminated when their work for the unionized predecessor became known.

The government and the union allege that the employer's refusal to hire or consider for hire members of the previous work force was motivated by antiunion animus and that the termination of three former employees was similarly unlawfully motivated. Moreover, the government contends that the employer unlawfully and coercively conveyed its unlawful motives to employees, and engaged in a series of other threatening and coercive behavior. The government and the union further argue that the new employer was a successor employer to the predecessor cleaning vendor and that, but for the discriminatory hiring and firings, the union-represented former employees would have composed a majority of the new unit of cleaners. Accordingly, the government and the union contend that the employer's failure to recognize and bargain with the union was unlawful. Moreover, the government and the union contend that absent discrimination there is no reason to doubt that all of the predecessor's cleaners would have been hired, and therefore, under the rule recently reaffirmed by the Board in *Ridgewood Health Care Center, Inc.*, 367 NLRB No. 110 (2019), the successor's unilateral establishment of initial terms and conditions of employment violated the law. The government and the union further allege that eight months later, at the end of June 2017, when the employer contracted out the cleaning services to a third-party contractor, its failure to notify and provide the union with an opportunity to bargain was a further violation of the law. The government further alleges that in preparing for the hearing in this matter, the employer's counsel engaged in unlawful interrogation of a group of employee witnesses. Finally, the government and the union allege that all four of the respondents in this matter constitute a single employer under the National Labor Relations Board (Board) precedents.

As discussed herein, I find merit in nearly all of the government and union's allegations. It is a strong case for the government, on every front. The government's persuasive affirmative evidence is met by a defense that relies on incredible (and discredited) denials of the direct evidence of discrimination, requires acceptance of fantastic coincidences, and often rests on nonexplanations—just silence—about the employer's suspect practices. As discussed herein, the employer's violations and conduct fully warrant the traditional and special remedies requested by the government and also a broad cease and desist order.

STATEMENT OF THE CASE

On November 15, 2016, the Service Employees International Union Local 32BJ (Union) filed an unfair labor practice charge alleging violations of the National Labor Relations Act (Act) by Fareri Associates, LP, docketed by Region 1 of the Board as Case 01–CA–188158. The Union filed an amended charge in the case on December 16, 2016, and a second amended charge in

the case against Fareri Associates, LP, Greenwich Park, LLC, Greenwich Premier Services Corp., and Brenwood Hospitality, LLC, (hereinafter referred to collectively as the Employer, Respondent or the Fareri companies), on May 3, 2017. The Union filed a third amended charge in this case against the Employer on February 1, 2018.

On December 16, 2016, the Union filed an unfair labor practice charge alleging violations of the Act by Fareri Associates, LP, docketed by Region 1 of the Board as Case 01–CA–190046. An amended charge against the Employer was filed by the Union in this case on May 3, 2017.

On January 24, 2017, the Union filed an unfair labor practice charge alleging violations of the Act by Fareri Associates, LP, docketed by Region 1 of the Board as Case 01–CA–191779. An amended charge against the Employer was filed by the Union in this case on May 3, 2017.

On January 31, 2018, the Union filed an unfair labor practice charge alleging violations of the Act by the Employer docketed by Region 1 of the Board as Case 01–CA–214016.

Based on an investigation into these charges, on March 29, 2018, the Board's General Counsel, by the Acting Regional Director for Region 1 of the Board, issued a complaint and notice of hearing in these cases. The Employer filed an answer denying all violations on April 9, 2018.

A trial in this matter was conducted on August 29–31, September 12–13, October 29–November 2, and December 4, 2018.[1] Counsel for the General Counsel, the Respondent, and the Charging Party filed post-trial briefs in support of their positions by April 1, 2019.[2]

On the entire record,[3] I make the following findings, conclusions of law, and recommendations.

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[1]A motion to amend paragraph 12 of the complaint was granted without objection at the commencement of hearing. That amendment to the complaint is set forth in writing as General Counsel's Exhibit 2, and describes allegations 12(a)-(e). An oral motion to add an allegation to the complaint that Cindy Jenereaux was a supervisor and agent of the Respondent under the Act was also made at the commencement of the hearing and granted over the objection of the Respondent. On October 31, 2018, the General Counsel moved to further amend the complaint to allege an unlawful interrogation of employees by counsel as part of the preparation for the hearing (Tr. 966, 969). That amendment is denominated (unhelpfully) in the transcript as paragraph 12(a)—but is wholly separate from the other subparagraph that is 12(a). I will refer to the October 31 amendment as the *Johnnie's Poultry* allegation, in reference to the case precedent relevant to the allegation. That motion to amend was granted over the objection of the Respondent, and its November 26, 2018 motion to dismiss the *Johnnie's Poultry* allegation was denied by order issued November 28, 2018.

[2]Throughout this decision, references to the Respondent's brief are to its amended post-hearing brief.

[3]I note that Joint Exhibit 2, offered and admitted without objection, amends, supersedes, and corrects the transcript, specifically portions of the transcript from Rosalia Bravo-Affon's August 30, 2018 testimony. The Charging Party's motion, contained in its brief (CP Br. at 12 fn. 13) to correct the record to reflect the correct spelling of the name of employee Ana Elicea is granted. Other corrections to the transcript are contained in an Order Correcting Transcript, issued contemporaneously with the issuance of this Decision.

JURISDICTION

At all material times Respondent Fareri Associates, a Delaware limited liability company, with an office located at 2 Dearfield Drive, Greenwich, Connecticut, is and has been a real estate development company. At all material times, Respondent Greenwich Park, LLC, a Delaware limited liability company with an office located at 2 Dearfield Drive, Greenwich, Connecticut, has owned buildings 1–6 and leased buildings 8 and 9 of the Greenwich Office (GOP) facility located in Greenwich, Connecticut. At all material times, Respondent Greenwich Premier Services Corp., a Connecticut corporation, with an office located 2 Dearfield Drive, Greenwich, Connecticut, has been engaged in the property management of the GOP buildings owned or leased by Respondent Greenwich Park, LLC. At all material times, Respondent Brenwood Hospitality, LLC, a Connecticut limited liability company, is and has been engaged in the business of hotel management and operates the J House Greenwich, a boutique hotel located at 1114 Putnam Avenue, Greenwich, Connecticut, and between November 5, 2016, and July 1, 2017, provided the cleaning services at the GOP buildings owned or leased by Respondent Greenwich Park, LLC. The General Counsel alleges and the Respondent admits that during the 12-month period ending February 28, 2018, Respondent, in conducting its operations derived gross annual revenues in excess of $100,000 and purchased and received at its Greenwich facilities goods valued in excess of $50,000 directly from points outside the State of Connecticut. The General Counsel further alleges and the Respondent admits that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

Findings of Fact

A. The Respondents and an overview of their operations

The companies named as respondents in this proceeding are four: Fareri Associates, LP, a real estate development company; Greenwich Park, LLC, formed in 2016, which owns and leases property in Greenwich Office Park (GOP); Greenwich Premier Services Corp. (GPS), a property management company that manages buildings in GOP; and Brenwood Hospitality, LLC, which does business as J House, an 86-room hotel and restaurant in the Riverside suburb of Greenwich, less than ten miles from the GOP. Collectively, I will refer to these respondents as the Respondent, or the Employer, or the Fareri companies.

The GOP is a nine-building office park located in Greenwich Connecticut, which is in Fairfield County. The buildings are three or four stories. The GOP buildings contain a variety of commercial, medical, and other business tenants.

John Fareri is involved in real estate development, ownership, and construction. He owns approximately 50 or more business entities primarily in Greenwich, Connecticut, and Westchester County, New York, with one or two more in Florida. The parties stipulated that John Fareri is the 100 percent owner of three of the four respondents: Fareri Associates, Greenwich Park, and

Brenwood Hospitality. The parties also stipulated that he is 85 percent owner of Greenwich Premier Services. His daughter, Julia (or Julienne) Fareri owns the remaining 15 percent.[4]

As their full names suggest, Fareri Associates, LP was formed as a limited partnership, and Greenwich Park, LLC, and Brenwood Hospitality, LLC, as limited liability corporations. They file taxes as partnerships. John Farer is the principal partner and owner and the principal for each entity. Greenwich Premier Services is an S corporation, and as principal shareholder Fareri retains ultimate authority over the corporation.

John Fareri is not only the exclusive or majority owner of each of the Respondents in this matter. He is also the principal or ultimate decisionmaker for each Respondent and possesses the authority to veto any of the decisions made by individual managers of the entities. Both Fareri Associates and Greenwich Park are holding companies and do not employ any employees. All of Fareri Associates and Greenwich Park operations are managed by individuals employed by GPS and/or Brenwood. John Fareri has authority to hire or fire anyone at these entities.

Christopher Sheskier is, "[f]or all intents," the chief financial officer (CFO) for each of the four Respondents and retains and exercises direct and/or "dotted line" authority over the financial decisions for all Respondents and for numerous individuals. In his role as CFO, Sheskier is responsible for overseeing all financial aspects of the four Respondents, securing financing for current and future projects, acquisitions, cash flow and overseeing payroll. Sheskier is involved in budgeting for the companies but, as he explained, "most of our entities do not have budgets that are being adhered to, [such as] budgets that are being formulated to be matched against operations."

Sheskier also oversees and has ultimate property management responsibility for the GOP. Sheskier directly oversees four accountants, three of whom are property accountants employed by GPS. He also oversees a "floater" employed by GPS, who helps Sheskier with monthly reports to the lender regarding GOP, but over whom Sheskier has the authority to order to perform work for any of the other entities as well. Sheskier also oversees a financial accountant.

Sheskier also has "dotted line" oversight and authority over several other individuals employed either by GPS or Brenwood. These include Property Manager Kelly Pia, who managed the GOP for the Respondent until she left its employ in early December 2016; current Senior Vice Presidents and Property Managers Cindy Jenereaux and Christian Bilella---Bilella took over management of the GOP from Pia; a hotel general manager who manages the J House; Human Resources Manager Ildiko Simon, employed by Brenwood; a hotel accountant employed by Brenwood;[5] and two vice presidents employed by Wescorp and Gateway Development Group, two construction-related entities owned by Fareri that are not named as respondents in this

[4]CFO Christopher Sheskier gave slightly different figures, testifying that Fareri owned 90 percent of Greenwich Premier Services, 99 percent of Greenwich Park and Brenwood Hospitality, and 90 percent of Greenwich Premier Services. Over the course of his substantial testimony in this case, I developed a lot of confidence in Sheskier's knowledge of the Fareri companies. However, the differences here are immaterial, and I will assume (without deciding) for purposes of this decision that the parties' stipulation on the matter is correct.

[5]Sheskier reviews Brenwood's financial reports and according to Sheskier, "you could say [the hotel accountant is] a direct report if you want, but I'm not there overseeing him on a daily basis. I oversee his work."

matter.[6] Sheskier also had oversight responsibilities for the controller, Tom Vitti, who was employed by GPS but served as controller for all four entities.[7] Vitti processed the payroll for GPS and Brenwood, including the GOP cleaners, until he retired in December 2016. Thereafter, the payroll for Brenwood, the GOP cleaners, and GPS was centralized at Brenwood Hospitality and processed by Simon.

All entities except the hotel share the same corporate office at 2 Dearfield Drive, Suite 3, Greenwich, Connecticut. Brenwood Hospitality has its own office at the hotel, but all four entities use the 2 Dearfield Drive office for tax return purposes. All four entities share the 2 Dearfield Drive address in their state corporate registration initial-formation filings. The financial books of the three entities are maintained at the 2 Dearfield address. The Brenwood Hospitality books are maintained at Brenwood's hotel office, but Sheskier has oversight of the books and can access the Brenwood books electronically from his office at 2 Dearfield. Additionally, while Brenwood Hospitality has its offices at the hotel, its various insurance policies for the different entities, from November 2016, were sent to the controller (Tom Vitti) c/o Fareri Associates at the 2 Dearfield address.

The four Fareri companies use the same insurance brokerage firm (Brown & Brown d/b/a the Rollins Agency/Gaston & Associates). The evidence shows they obtained various business insurance, including workers compensation insurance from this firm. All of the insurance policies submitted by Respondents into evidence reveal that they were sent by the Rollins Agency "c/o Fareri Associates" at the 2 Dearfield Drive address, mostly to the attention of Tom Vitti, who was employed by GPS, but who handled insurance and other payroll matters for all the respondents as controller until his retirement in December 2016.

The GOP's property manager since December 2016, when Kelly Pia left the employ of the Fareri companies, is Christian Bilella. He is employed by GPS. As noted, he reports on financial matters to Sheskier. In all other matters he reports directly to John Fareri. The same authority and reporting responsibilities apply to Cindy Jenereaux, who is vice president of property management, and a property manager employed by GPS but who manages Fareri-owned properties unrelated to the events in these cases.

On November 4, 2016, Greenwich Park closed on its acquisition of the GOP buildings 1-6, and began leasing buildings 8-9.[8] While Greenwich Park owned and leased the GOP buildings,

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[6]The record revealed that Wescorp was dedicated to renovations and repair work, while Gateway was devoted to new construction. Wescorp is wholly owned by John Fareri. Gateway is 51 percent owned by John Fareri.

[7]As controller, Vitti handled insurance for Brenwood Hospitality and Fareri Associates. According to Sheskier, Vitti would have been involved in approving a decision to pay the GOP cleaning supervisors—i.e., as discussed below, the Roldan brothers, Julio and Rolando—higher wages than the cleaners.

[8]Only Building 7, which was separately owned and operated was not part of the Fareri assumption of the GOP. The record indicates that Building 7 is owned by Catterton Partners and both in ownership and operation is unrelated to the Fareri companies. The record does not speak definitively to whether Building 7 was independently owned and operated before the Fareri assumption of the remainder of the GOP facility, or whether, as one witness suggested, Fareri bought it as part of the GOP acquisition and immediately sold it.

GPS manages the GOP property. Brenwood Hospitality employed and provided cleaning for the period November 5, 2016 through June 30, 2017.

During this period, as part of his responsibility as director of housekeeping (also called rooms manager), at Brenwood Hospitality, Raul Hernandez managed the cleaning functions at GOP. As discussed below, Hernandez was engaged to include the GOP cleaning in his work in a one-on-one meeting with John Fareri at the J House hotel. As further discussed below, the decision to have the cleaning work performed by Brenwood Hospitality with employees hired for that purpose—instead of having a third party vendor clean the buildings—was made by Fareri with input and assistance from Sheskier and Pia, who initially was the Fareri companies' property manager for the GOP.

Hernandez remained an employee of Brenwood during the period after November 4, when he managed the cleaners at GOP. The cleaners also were employed by Brenwood. However, Hernandez' two top assistants, Julio and Rolando Roldan were both employed by GPS. While at the GOP, Hernandez worked closely with the GOP property manager, who first was Kelly Pia and then, when she left in December 2016, thereafter was Christian Bilella. The record demonstrates that with regard to tenant services, Hernandez takes direction from Pia and Bilella. Hernandez admitted that both Pia and Bilella have the authority to terminate his cleaning employees. After Hernandez hired an employee as a cleaner at GOP, Pia would handle the necessary paperwork for that individual (GC Exh. 51 at para. 13). Pia and Bilella were employees of GPS and they each reported directly to John Fareri, with dotted line reporting to Sheskier.

GPS charged Greenwich Park management fees for managing the property. The management fees that Greenwich Park paid GPS include reimbursement for GPS payroll that was apportioned for work performed by Greenwich Services personnel on or at GOP. Thus, while Bilella is employed by GPS, Greenwich Park reimbursed GPS for his salary and reimbursed Brenwood for the costs related to the cleaners. Bilella's salary was reimbursed to GPS by at least 80 percent. An assistant property manager and administrative assistant who also worked at GOP for GPS were reimbursed at as much as 100 percent, and the property accountant was reimbursed at approximately 50 percent as he worked on other projects. GPS is also reimbursed by Greenwich Park for a maintenance staff that it employs and pays at GOP.

While Brenwood was performing the cleaning, Greenwich Park paid directly for the cleaning supplies use by the cleaners who worked for Brenwood Hospitality. Sheskier testified that during this period it was most likely GPS property manager Bilella who was ordering the cleaning supplies. The invoice would be in Greenwich Park's name but the payment would be out of GPS's check clearing account. Sheskier suggested this was a typical arrangement for property management companies managing properties, although in this case the ownership and top management of the property-owning entity and the property-managing entity overlap.

It is normal for a property to pay management fees to the property management company. But as Sheskier quipped, an "upside of being a management company is you pay yourself." In other words, GPS writes a check from Greenwich Park funds to pay itself a monthly management fee.

As noted, the cleaners at GOP were paid by Brenwood Hospitality and considered by Sheskier to be Brenwood Hospitality employees subject to the personnel policies and procedures in place for the Brenwood Hospitality J House Hotel employees.

Generally John Fareri left hiring and firing of lower level staff to the managers, but he was involved in the hiring and firing of upper level managers, such as Sheskier, or the general manager of the J House. John Fareri does not get involved in operations of J House by choice, but does when [h]e has to," for instance "when we have a problem with the general manager."

Most paychecks for cleaners were paid by direct deposit. But when physical checks were cut at the ADP payroll service and delivered to 2 Dearfield, someone from GOP administrative staff (employed by GPS) would pick up the checks and distribute them to employees.

The employee handbooks for J House and for GPS (the latter of which is also the joint handbook for the two Fareri-owned construction firms as well as GPS) bear significant similarities in style and format. Sheskier directed Vitti and Simon to update the handbooks in 2016. John Fareri's daughter, Julie Fareri, might also have been involved. Both handbooks list John Fareri and Sheskier as "Names to Know." In the GPS handbook they are listed as part of GPS, in the J House handbook they are listed as names to know at Fareri Associates. The final format of these handbooks was approved by Sheskier who had them updated in response to demands of the insurance companies. Many portions of the handbooks, including many rules and policies are substantially similar or identical. (Compare R. Exh. 9 to GC Exh. 36).

B. The GOP and AffinEco

As referenced, the Fareri companies closed on the GOP acquisition on November 4, 2016. Through that date, for at least ten years, the janitorial and cleaning services for the GOP were provided by AffinEco Building Services (AffinEco) or one of its corporate affiliates or predecessors under contract with the property management company CBRE.[9]

As of November 4, 2016, there were approximately 21 AffinEco cleaners working at GOP, 14 full-time and 7 part-time. Some had seniority dates stretching back to 2001. As of November 4, 2016, 13 full-time employees worked Monday through Friday 6 p.m. to 2:30 a.m., 1 full-time employee worked daytime, approximately 8 a.m. to 5 p.m., and 7 part-time employees worked Monday through Friday 6 p.m. to 10 p.m. These cleaning employees performed office and bathroom cleaning, dusting, vacuuming, mopping, kitchen cleaning, garbage removal, and other such tasks, for tenants and in the common areas of the GOP buildings. In addition, they performed extra "direct tenant" services requested by specific tenants.

These cleaning employees were represented for purposes of collective-bargaining by the SEIU 32BJ (Union). The GOP cleaners' terms and conditions were governed by the 2016 Hudson Valley and Fairfield County Contractors Agreement to which the Union and numerous

[9]As testified to by AffinEco's managing partner, Paul Senecal, AffinEco is a parent holding company for several cleaning service and maintenance brands, including Melillo, United Services of America, and Premier Maintenance. These service brands became part of AffinEco, often as the result of a merger or acquisition of services. They are all operated as one entity. Throughout the hearing, witnesses variously referred to Melillo, United Services, AffinEco and (somewhat less so) to Premier Maintenance. For our purposes all such references are interchangeable. Throughout this decision I will refer to AffinEco as the entity providing janitorial and cleaning services to the GOP until the evening of November 4, 2016. In a few instances, for convenience, I quote text or transcript as if the word AffinEco was used even if the actual reference was to one of the other Affineco-related companies.

cleaning contractors (including AffinEco) were party.[10] This agreement was effective from January 1, 2016, through December 31, 2019. The agreement provided, among other things, for employer contributions on behalf of unit employees at GOP to union health care funds, pension funds, prepaid legal funds, and to a training scholarship and safety fund.

C. Fareri acquires the GOP

By early 2016, the Fareri companies became interested in acquiring buildings in the GOP. By approximately May 2016 a conditional contract had been signed and a deposit was placed in June 2016.[11] A due diligence period followed during which Fareri evaluated the purchase. While Fareri hoped to secure financing to acquire the buildings and close on the deal by July, that did not happen and a couple of extensions were sought that postponed the closing.

As part of the due diligence, and as preparation to operate the GOP, Fareri began looking for the many vendors necessary to manage and operate an office building complex. These included, for instance, grounds maintenance, elevator maintenance, snow removal, utilities, and, most pertinent to the instant cases, janitorial services.

No later than August 2016, Kelly Pia, formally a GPS employee, using a Fareri Associates email, and identifying herself as a project coordinator for Fareri Associates, was in discussions with AffinEco's managing partner Paul Senecal about the cost to continue having AffinEco clean the GOP when Fareri closed on the properties. By email dated August 26, Senecal sent Pia a proposal to continue performing the cleaning work at GOP once the Respondent took over. By August, CFO Sheskier was involved, creating an internal document to compare the cost of the bid received from AffinEco to the cost the Fareri companies paid for cleaning in other buildings they managed or owned. He shared his evaluation with Pia and with John Fareri.

Sheskier testified that sometime in the summer of 2016, the Fareri companies received a "GOP seniority list" for the cleaners. This document included the names, home addresses, phone numbers, and dates of hire for 20 of the 21 union-represented GOP employees. Later in November 2016, after the Union filed unfair labor practice charges, Sheskier testified that he began annotating the seniority list to track which of the former AffinEco employees the Fareri companies had hired, which were "still working" at GOP, and which had been terminated.

By late September or early October, John Fareri and Sheskier became directly involved in discussions with AffinEco. In October, weeks after submitting the bid, AffinEco's managing partner, Senecal, spoke by phone with John Fareri and Pia one evening, explaining for the first time that due to negotiated agreements with the Union, AffinEco was required to incrementally convert to the use of more full-time cleaning employees at GOP (and fewer part-time). Senecal told them that the conversion had been delayed through agreement with the Union for some years, but was going to be unavoidable. While currently 14 employees worked full time, more would have to be converted to full-time in the near future. Senecal explained that this

[10] The recognized bargaining unit embodied in the 2016 Agreement is:

> All service employees in any facility, excluding commercial office buildings under 100,000 square feet, in Westchester, Putnam, Dutchess, Rockland, Orange and Sullivan Counties in the State of New York and Fairfield County in the State of Connecticut.

[11] During this first half of 2016, Greenwich Park, LLC was formed. The other three respondents involved in this proceeding already were in existence.

"conversion" process would affect his pricing in the near future, increasing costs beyond that provided in the original August bid. John Fareri told Senecal, "that's going to make it very difficult for us to do business together." Senecal explained that any union contractor working under the agreement with the Union would be required to convert part-time employees to full-time employees.

This was a problem. Indeed, Sheskier testified that he wanted the cleaning done on four-hour shifts, with everyone finished by 10 p.m. In his view, "the general norm is part time cleaning, in pretty much every one of our buildings."

However, the parties continued their discussion and negotiations. AffinEco representatives met with John Fareri, Pia, and Sheskier, at Fareri Associates offices at 2 Dearfield Drive, Greenwich, on or about October 24. Fareri described the purpose of the meeting as in accord with his desire "to give contractors who are on the job, you know, preference." However, during the meeting, Senecal explained the conversion requirements in more detail and emphasized that they were binding on AffinEco.

During this meeting, Senecal told the Fareri representatives that AffinEco was "stuck with the Union." Sheskier and/or John Fareri responded, "Are we stuck with the Union? Are we stuck with the Union?" Senecal told them "that's something you need to seek legal counsel for. We have no choice. We have to do this."

Fareri appeared unhappy with this, and at some point he left the meeting. After the meeting, Sheskier reported to Fareri that "not only is there not flexibility, but it's going to cost you more." In addition to the conversion issue, at some point during the due diligence period Sheskier learned that AffinEco charged tenants separately for additional "direct tenant" work that was not part of the proposed contract between AffinEco and Fareri. Sheskier was not in accord with this model.

Fareri received bids from several cleaning vendors, but found the costs to be "astronomical" in each case, far more than it expected to pay. Although less extensively reviewed, the record suggests that during this time period the Fareri representatives secured cleaning bids from at least two other union cleaning contractors in addition to AffinEco. Sheskier testified that in meetings with other union contractors Fareri representatives learned that, as Senecal had suggested, all the union contractors had to comply with the provisions that required the use of full-time employees.

Just two days after the meeting with Senecal, on October 26, Sheskier met (or had a call) with a labor and employment law firm that, among other things, advertised that it specialized in union avoidance. Sheskier testified that this was at Senecal's prompting that Fareri speak to lawyers about whether the GOP could avoid the union's labor agreement and its costs. Senecal sent Sheskier a copy of the union agreement on October 27. Fareri was billed for work performed on October 26 and 27 by this law firm.

Although not satisfied with AffinEco's bid, Sheskier testified in his pretrial affidavit that the Fareri companies continued to seek a janitorial vendor that "met our business model," and continued to try to negotiate with Affineco up until November 3, 2016.[12] In late October, the Fareri

[12]The sworn pretrial affidavits of Sheskier and of Raul Hernandez were entered into evidence at the hearing. Pursuant to Federal Rule of Evidence 801(d)(2) statements in their affidavits may be relied upon as admissions.

companies had secured financing and funds to go forward with the closing on GOP. Sheskier managed to do this primarily by refinancing another building on October 29, freeing up funds to complete the GOP acquisition.

With the funds available, and the need to close now imperative, the decision was made on November 3, to "use the resources we had from Brenwood Hospitality, LLC's JHouse Hotel to recruit the janitorial staff," instead of relying—at least for the time being—on an outside janitorial company.

D. November 4, 2016: Fareri takes over the GOP and decides not to use a third-party cleaner; AffinEco is terminated

On November 4, 2016, Greenwich Park closed on its acquisition of the GOP buildings 1-6, and it began leasing buildings 8 and 9.

The day before, John Fareri, aided by Sheskier and Pia, made the final decision not to use AffinEco at GOP. This led to a second decision, one of necessity: having just acquired an office park loaded with tenants, they had no one to clean it. Thus, Fareri made the decision—again aided by Sheskier—to have the GOP cleaning done by Brenwood Hospitality, at least on a temporary basis. Both Sheskier and Fareri described the decision as one that they backed into—Fareri described it as a "fallback position." Having finally obtained the financing to acquire the GOP, they could not postpone the closing any longer, but they had yet to find an acceptable third-party cleaning contractor. As Sheskier explained it,

> we bought a building. And the reality was somehow people expected their place to be cleaned. So . . . how is that going to be done when we don't have a contractor. . . . So that decision was being made by John [Fareri] that this is we'll utilize resources that we have on hand. . . . We did not look to clean the park ourselves. We were looking to clean it with third parties, so it was never a decision made not to clean it with third parties. The decision was we did not have an acceptable third party at the time of acquisition and we had a dirty park to clean.

AffinEco heard from Sheskier late Friday afternoon, November 4. Sheskier called to tell AffinEco that AffinEco's services would not be needed at the GOP and that Fareri had made other arrangements. Sheskier told Senecal that "your people should not show up tonight."

In truth, however, as discussed below, as of November 4, the Fareri companies arrangements were woefully incomplete. As John Fareri testified and as related in Sheskier's affidavit, a temporary plan had been worked out "in case we were not able to sign on an outside janitorial service by the time we closed on the property, with Raul Hernandez, the rooms manager for J House, to recruit and supervise the staff that cleaned the GOP buildings." Hernandez, however, did not have staff to clean the GOP. Despite this, no consideration was given to hiring the experienced cleaners already at the GOP, who, on Sheskier's direction were sent home the evening of November 4, after arriving for work.

Indiana[13] Pena, who worked full-time at GOP testified that November 4, the evening began "like any other day," but "[t]hen we were told to stop what we were doing, leave everything

[13]Pena's first name is variously spelled in the record as "Indiana" and "Yndiana." I believe both are correct and both used by Pena. For conformity, I use Indiana throughout this decision.

the way it was and to go to Building 2." Pena testified that once there, the AffinEco manager at GOP, Carlos Pena (to whom Indiana Pena was married but separated) spoke to the employees: "[w]hen we got there . . . we were told that the buildings were sold to a man by the name of John Fareri. That the man did not want neither the employees there nor the company that was servicing." On cross-examination, counsel for the Respondent elicited Pena's agreement that "in substance" the manager told the employees that "the new owner did not want the employees who had been with the previous company or the Union." Pena testified that "[w]e were told that we had to leave right away; we no longer had jobs there. We had to leave immediately and it was very traumatizing."[14]

Elidel Garfias, who had worked as a cleaner at GOP since 2001, testified that on November 4, she was just beginning work when a supervisor, Manuel Suneca, called and "told me to return the keys because we had been fired." Garfias returned the keys and met with other employees at Building 2. There, Manager Carlos Pena told them they would need to call the Union for a fuller explanation. Rosalie Bravo-Affon, who had cleaned at GOP since 2007, testified that she "went to work on the day of November 4, like any other day," but "10 minutes later I received a call from the supervisor [probably Manuel Suneca] where he says, leave everything ma'am and come here to the offices." Most of the workers, approximately 20 of them, assembled in the office at GOP, located in the lower level of building 2. The workers were told by the AffinEco manager at GOP, Carlos Pena, "that the work had finished and that we had to go home because they were throwing us out . . . [t]he company and all of us, we have to go." Pena responded to employee questions by telling them that "they did not want us or the company in that building anymore." Mayra Maurad, who had worked at the GOP since 2007, testified that about 6:30 p.m., a supervisor named Manuel came to her area and "told me to put my stuff away, that the company no longer worked there and that we had to leave, to go downstairs to the office and leave our keys and go." She went to the office where Pena told the workers to leave. Other workers described Pena telling them that they would have to call the Union.

E. November 5, 2016: Brenwood takes over the cleaning

As noted, Raul Hernandez was the director of housekeeping at Brenwood Hospitality's J House, where he supervised a staff of 7-8 cleaners, and other maintenance and lobby attendants. The cleaners at J House typically worked 32 hours a week. Hernandez' typical hours at J House were 7 a.m. to 6 p.m.

As noted, in his affidavit, Sheskier stated that in the days before the closing a plan had been developed that would have Hernandez undertake to staff the GOP. John Fareri testified that a week or two before the November 4, 2016 acquisition of GOP, he alerted Hernandez to the possibility that "[j]ust in case we couldn't come to an agreement with a cleaning contractor," he would ask Hernandez "to mobilize to clean the office park on a temporary . . . basis."

Whether or not this plan was in place between Sheskier and Fareri before the closing, Hernandez---both his testimony and his affidavit—makes clear that he had no knowledge of it until November 5. He testified that Fareri approached him for the first time about cleaning the GOP on

[14]The account of Manager Pena's comments are not hearsay to the extent offered as evidence of what employees were told—it is, after all, why they left the jobsite. I note however, that while Manager's Pena's comments about Fareri's intentions not to employ the AffinEco employees is hearsay to the extent offered for the truth of the matters asserted, it is hearsay that corroborates subsequent events and subsequent admissions of Hernandez and Roldan as directly stated to former AffinEco employees on November 7. See below.

Saturday, November 5, 2016, when Hernandez met alone with John Fareri at the J House for about 15-20 minutes.[15] Hernandez testified that that this was the first time Fareri had discussed the cleaning at the GOP with him and that before this meeting he was not familiar with the GOP at all. Fareri told Hernandez to find cleaners to do the work as fast as possible. Hernandez agreed to take charge of it.

Thus, even granting that Sheskier and Fareri had planned a week or two in advance to have Hernandez find staff for the GOP, Hernandez had not done so—he did not even know he was supposed to—before the November 5 meeting with Fareri. As of November 5, he had no staff in place to clean the GOP.

Early that afternoon Hernandez viewed the GOP for the first time, meeting with Fareri's property manager for GOP, Kelly Pia. Together, they did a walk-through of the buildings. At that time, Hernandez estimated he would need 20 cleaners for the volume of work he saw. The GOP, at approximately 380,000 square feet, was, perhaps, ten times larger than the J House by square footage. There were seven or eight cleaners working at J House, and two lobby attendants, but they already worked close to full time at J House. Ultimately, Hernandez determined that he needed approximately 26 cleaners to work Monday through Friday, 6 p.m. to 10 p.m., and an additional seven or eight cleaners to work weekends providing extra services requested by tenants.

After performing the walk-through of the GOP with Pia, Hernandez at that point had not hired anybody to clean at the GOP. Pia asked Hernandez if he could find staff to clean the GOP and Hernandez said he could. He testified that he knew he needed to find people right away.

Although a fully-trained workforce of cleaners with experience in the GOP buildings had been laid off the night before, and was available for work, no effort was made to contact them, or the union that represented them, in order to see if they wanted to continue working at GOP. This is so even though the Fareri companies had received a seniority list of the AffinEco employees a few months earlier that included the employees' phone numbers and home addresses. This is so even though Sheskier expressed a preference for incumbent contractors ("we like to give contractors who are on a job, you know, preference").

Instead, after meeting with Pia on November 5, Hernandez set out to find individuals to work that night to clean the GOP in stopgap fashion, by calling on friends and coworkers that he knew were not working and looked for employees—anybody—to work, without regard to their experience or skills. Some had experience cleaning houses—but not commercial buildings such as GOP. Some had no cleaning experience at all. All Hernandez knew or was told about them by friends was that they were interested in work. He hired a total of 8 (including 2 supervisors), all or nearly all of whom were hired sight unseen when they showed up that afternoon.

Hernandez worked at J House with Rolando Roldan, who worked there as a maintenance engineer. Rolando began working at the GOP on November 5 as "the second supervisor in charge," working at $11 an hour. Rolando called his brother, Julio Roldan, about working at GOP. Julio had previous experience working for a cleaning company. Julio Roldan showed up the afternoon of November 5, and Hernandez offered Julio Roldan "work at Greenwich Office Park

[15] I note that in his questioning of Hernandez, counsel at one point inadvertently referred to the date of the meeting as December 5, not November 5. I have no doubt and I find that the meeting occurred on November 5, and that Hernandez intended his answer to reflect that.

helping him to run the building cleaning." As Roldan explained: "[Hernandez] did not have experience cleaning office spaces. And since I had experience he said that he wanted me to help him while he learned." Hernandez made Julio a supervisor at a rate of $14 an hour, soon increased to $17 an hour. Hernandez agreed to hire Julio without meeting with him first or discussing anything with him.

Hernandez spoke with a supervisor at J House who contacted a cousin, Marvin Duvan, who accepted the job through the cousin. He had no cleaning experience, and Hernandez hired him sight unseen, knowing nothing about his abilities or experience. Hernandez also brought in a friend of his, Melanie Rangel who cut hair in a beauty salon, because she had asked in the past if he had work for her at the hotel. Melanie brought her sister along—Hernandez could not recall her name and knew nothing about her, but she was hired too. He also hired a friend of someone named Isis, a woman named Christina Velasquez. Hernandez knew nothing about her. In addition, Hernandez brought in a new supervisor from J House, Melvin Vasquez to work at GOP. The evidence suggests one more employee was hired at this time.[16]

This group of six, with no cleaning experience, at least as far as Hernandez knew, were each paid $10 an hour. The Roldan brothers were paid more. Rolando was initially paid $11 an hour and upgraded to $13 an hour within a few weeks. Julio Roldan, who Hernandez hired as a supervisor with authority to assign work to employees (Tr. 717-718) was initially paid $14 an hour, soon increased to $17 an hour.

At the time of this initial hiring, none of these employees filled out applications, provided I-9 or W-4 information as part of the hiring process. There were no interviews. They also did not work a normal schedule. By Monday November 7, Hernandez established the 6 to 10 p.m., five nights a week schedule for cleaners that was maintained for the next seven months, with extra tenant work being performed on weekends. However, in emergency fashion, on November 5, this newly hired small complement set to work cleaning buildings on Saturday November 5, from 9 a.m. until midnight or 1 a.m., (16 hours) in which time they were able to clean four buildings. Some of the group, about four or five of them, returned on Sunday morning at about 8 a.m., November 6, and cleaned the remaining three buildings by about 5 p.m. to 7 p.m. or later (9 hours).[17] Notably, of this group of six "emergency" hires from November 5, only one (Melvin Vasquez) appears to have remained employed through the following week, and he quit at the beginning of December.

[16]Hernandez testified that Julio Roldan brought a friend of his along, Irma Arango—a former AffinEco employee—and that she was hired to work November 5. I think this was an error, to which counsel may have unintentionally contributed. No documentation supports it. Rather, the documentation suggests that Irma Arango was hired much later, for the week ending December 18, 2018. As Julio Roldan explained, he hired Arango at the specific request of a tenant who asked for her to be brought back.

[17]Hernandez first testified that the group cleaned three buildings on Sunday November 6, but when confronted with his affidavit, which stated that they did not clean on Sunday, he changed his testimony and said they did not clean on Sunday. However, Julio Rolando testified very assuredly that they did—although without Hernandez. I think that explains Hernandez' confusion, and I find that the group, minus Hernandez did return to finish the cleaning of the three buildings on Sunday.

F. The Union and former AffinEco employees' response

The evening of November 4, Union Representative Carmen Sargent began receiving repeated voice mail messages from employees saying they had been asked to leave the building and that they had been sent home. Sargent met with employees the next day, Saturday November 5, and learned from them that there were new owners and that the employees were out of their jobs. She spoke with one of the principals from AffinEco who had called her, and confirmed from him the employees' account of events. He told her that the new owner was John Fareri. Sargent outlined a plan for employees to seek employment as a group from the new employer and, if necessary to engage in a public campaign to get the former employees hired.

On the afternoon of Monday, November 7, 2016, Sargent sent a letter to John Fareri with a copy to Kelly Pia. The letter was sent by email at 2:18 p.m. to Fareri and Pia at their Fareri Associates email addresses and for good measure, also by overnight mail, and by fax. The letter, on union letterhead stated, regarding "Greenwich Office Park, Greenwich CT:"

> Dear Mr. Fareri:
>
> We understand that your company has purchased the property at Greenwich Office Park, Greenwich CT. As you may know, SEIU Local 32BJ represents the building service workers who up until Friday November 4 at 6 PM were employed by [AffinEco] to clean the buildings at Greenwich Office Park. I am writing on behalf of these workers to make an unconditional request for application for employment. Attached please find a seniority list of the current employees at the facility. Please advise the undersigned of any specific application procedures required of the individual employees. Please also provide us with the name and contact information of the contractor, if any, you plan to use to perform the cleaning work at the site.
>
> If you have any questions or need any additional information, please contact me at [mailing address, telephone number, and email address].

Attached to the letter was a seniority list of the GOP cleaners working for AffinEco (United Services), listing their names, seniority date, and rate of pay. The list included 19 names, but, as Sargent testified, inadvertently omitted two employees—Mayra Maurad and Virginia Cruz.

By the end of the afternoon, having not heard anything back from her letter, Sargent planned a meeting with the workers at a gas station near the GOP at about 5:30 p.m.

G. November 7, 2016: Hernandez establishes regular cleaning hours; a group of former AffinEco employees go to GOP to seek employment

Meanwhile, that morning, Monday, November 7, Hernandez began his normal duties at J House and then met Fareri's Property Manager Pia at the GOP at about 10 a.m. Pia, who by November 7, had an office at GOP, went through the buildings with Hernandez, meeting with each of the tenants for 10-15 minutes, and introducing Hernandez as the new person responsible for cleaning, and reviewing their cleaning needs. This took until about 2 p.m., at which time

Hernandez returned to J House. Having done a catch-up cleaning over the weekend, the plan was to return in the afternoon, and begin regular cleaning hours from 6 pm. to 10 p.m., Monday-Friday.

The problem was that Hernandez did not have anywhere near enough cleaners. At this point, Hernandez had the six cleaners (plus the Roldans), but anticipated he would need at least 20. When he returned to GOP at about 5 p.m., for the 6 p.m. shift, Hernandez brought with him four J House cleaners, who having completed their day's work, agreed to work at the GOP in the evening.[18]

Although the new Employer was in immediate need of additional employees, Hernandez denied that at any time on November 7, he received from Pia the seniority list of former AffinEco cleaners that Pia received from Sargent's email and fax letter to Fareri that day. Although Pia knew he needed workers, and he told her he needed a lot of workers, Pia did not, according to Hernandez, mention that she had received emails from the Union asking for work for the former AffinEco employees. Indeed, Hernandez denied that anyone at Fareri Associates ever gave him a copy of the union seniority list, although this was contradicted by John Fareri, who believed that he, or someone, gave the Affineco employee information to Hernandez, probably within days of Fareri receiving it.

In any event, Hernandez was still hiring. Union Representative Sargent was early to her 5:30 p.m. meeting with former GOP employees at the gas station next to the GOP—so she got back in her car to go look inside the GOP campus for some of the workers who had not yet arrived at the gas station. When she got in the GOP campus, Sargent came across a group of workers that looked like cleaners walking out of a building at GOP with a man who, at that time, she did not know. Sargent asked the man, "are you hiring," and the man told her yes. Sargent asked for an application and the man said, "no applications, $10 cash" and he asked if Sargent was staying. This man had a J House logo on his jacket.[19] Sargent did not know the man at the time, but after seeing him at trial credibly and positively identified him as Raul Hernandez. Hernandez asked Sargent if she was staying. Sargent told him she had to park her car but then instead of parking went to the gas station to meet with the workers who were waiting for her.[20]

[18]These four were Julia Escobar, Esther Magnomal, Leona Sanam, and one other unidentified. Hernandez testified that the two jobs (the hotel and the GOP) were too much for Escobar and Magnomal—they had no one to watch their children in the evening—and they did not remain working at the GOP beyond the second week. There is no evidence in the record that Sanam worked even one full week.

[19]The logo was actually a J House name tag that Hernandez would pin or affix to his jacket.

[20]Although Hernandez says he did not recall this incident, I credit Sargent's credible and detailed account. More generally, Hernandez struck me as and proved himself a reliable agent of the Fareri companies and their litigation strategy. He was close enough to be willing, at John Fareri's request, to staff and manage the cleaners at GOP, work that was in addition to his ongoing duties as director of housekeeping at J House, for no additional compensation at all. Another example of his dedication might be seen in his willingness, in the first and second weeks to pay 12 employees who had yet to provide adequate employment documentation and had not received Brenwood paychecks, out of his personal savings account, with no reimbursement from the Fareri companies, relying only on the willingness of employees to repay him once they began getting Brenwood Hospitality paychecks. (only six of the twelve employees repaid Hernandez). These factors demonstrate Hernandez' loyalty to Fareri. But as discussed herein, this loyalty had

During the meeting at the gas station, one of the workers told Sargent she had heard from others that the new employer was hiring at GOP. And, of course, Sargent had just learned that on her own. Sargent told the employees to go and apply. The majority of the group at the meeting went into the GOP campus arriving there around 6 p.m. or a little after.

Numerous witnesses testified about what transpired when the group of former AffinEco cleaners arrived at Building 2 of the GOP on the evening of November 7, seeking work. While there are minor discrepancies in the employees' accounts—typical for a group independently relating an event described as "chaos"—the pertinent events are clear.

Hernandez recalled that a group of individuals looking for work—approximately ten in number—spoke with him at Building 2 in the GOP on that Monday November 7, sometime just after 6 p.m. These workers were first met by Julio Roldan.

Roldan estimated the group at about 15 people. Roldan testified that the first thing the group told him when he approached was that,

> that they were Employees of the prior Company and that some of them had a lot of experience, experience going back years and that they knew the buildings there. And that they were looking for work because they were unemployed.

Although only half an hour earlier, Hernandez had offered Sargent a cleaning job (not knowing who she was), and although Hernandez admitted (Tr. 798, 799) that at that moment he was looking to hire people, indeed, needed to hire (Tr. 753), none of the group of former AffinEco employees who congregated at the GOP lobby were hired that evening. Roldan told them, "I didn't think that they were hiring people at the moment," and he told them he would "look for the person who was appropriate" to make that decision. Roldan went to Pia's office where Hernandez was with Pia and told him what was happening. Hernandez claims that Pia told him it was up to him what he did about the group seeking employment. Despite admitting (Tr. 753) needing employees, Hernandez came out with Roldan and met the group and told them "we were not hiring at that moment," but that

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a less savory side. It manifested itself at trial through repeated instances of significant unbelievable testimony by Hernandez. Sometimes this is because it is contradicted by others, including those in Fareri management, and cannot be credited. Other times his testimony is implausible, or suspiciously, leaves major issues unexplained. I do not believe for a second that the decision to avoid hiring the former GOP employees, which was carried out by Hernandez, was something he developed on his own. No independent motive for him to do so was offered, or seriously, can be imagined. I note that while Hernandez testified that neither Pia, Sheskier, nor John Fareri gave him instructions about whom to hire—for what that testimony is worth—Hernandez was not asked and did not testify that he received no instructions from anyone on this subject. There are other possibilities. But I do believe Hernandez was assigned the role at trial of taking blame and, just as importantly, for attempting to see that no one else representing Fareri was implicated. Somewhat obviously I thought, at trial he carried out this unenviable task with a certain resigned determination, and even some gallows humor. Essentially, as numerous examples below attest, there is no reason to believe Hernandez when his testimony is contradicted by other direct and circumstantial (and persuasive) evidence, or appears implausible on its face.

> [t]he best we could do was to hand them a sheet of paper so that they could write down their names and phone number and that we would call them when we need personnel being that they had experience.[21]

This description of events by Hernandez and Roldan is roughly accurate, but omits some detail that employees credibly supplied.

According to employee Rosa Bravo-Affon, Roldan began to count the number of people in the group and asked "do you have experience" and the employees told him "yes, we had experience and from there he asked if we had worked with the previous company and . . . the great majority said yes . . . that we had worked for that company." Employees began to yell out the specific GOP buildings in which they had worked.

Roldan told the employees: "the owner of the company doesn't want anyone with [a/the] Union." Bravo-Affon told Roldan, "Ok, tell us the conditions and we can accept them . . . what we wanted at that moment was to work." According to Bravo-Affon, Roldan said he would make a telephone call and he left for about five minutes. He returned with Hernandez, who identified himself by the name "Raul." and told the group, "please, write down your names and your phone numbers, that we are going to call you." He also provided them with his cell phone number.[22]

Employee Mayra Maurad described a similar course of events. However, she testified that after Roldan went and got Hernandez, Hernandez "asked each one of us if we had experience," and people then began to yell out which buildings and which floors they previously worked. According to Maurad, Hernandez told the employees that

> at the new company they don't have a Union, that they are direct contractors. And as a result, we would have to call Fareri to ask if they would hire us.

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[21]I note that Hernandez' claim at trial that he did not know that this group of workers seeking employment was composed of former AffinEco cleaners is contradicted by Roldan, implausible, and deeply discrediting. I also specifically discredit Hernandez' claim that on November 7, he did not have an estimate of how many employees he would need (Tr. 850) and that this was why he did not hire any of the group that appeared on November 7. (Tr. 853). This testimony, solicited by Respondent's counsel with leading questioning flatly contradicted Hernandez' testimony that as of the November 5 walk-through of the GOP with Pia he estimated (Tr. 713-714) he would need 20 people to clean the GOP (and even that did not turn out to be adequate). When he met the group of former AffinEco workers on November 7 he had just eight workers (plus 2 supervisors) and four more J House employees he had brought over, and the 8 had just finished working two extremely long weekend days that proved that they were not sufficient to clean the GOP on a four-hour a night basis as planned, even without turnover, of which there was a lot. Indeed, Hernandez admitted that at the very time he left Pia's office to confront the group of former AffinEco employees, he was looking to hire people. (Tr. 798.) Hernandez's testimony that he did not need additional workers on the evening of November 7, was false, and his testimony throughout the hearing is suspect in its transparent effort to align, even when it required him to contradict his own testimony, with the Respondent's defense.

[22]Throughout her testimony, Bravo-Affon often exhibited uncertainty, and at times contradictory testimony, over whether a particular conversation had been with Hernandez or Roldan. As she put it, "[t]hey were always together." I found Bravo-Affon a credible witness, I note only her uncertainty over whether it was Hernandez or Roldan who made a particular statement at various points in her testimony.

Maurad testified that it was at this point that Bravo-Affon told them "it didn't matter if they had no Union, that we needed to work, and that the only thing we cared about was work, employment."

Maurad testified that Hernandez and Roldan left to make the telephone call, but returned and said that "unfortunately they weren't able to reach Fareri, that all they can do is give us a blank page and to write our names, our phone number, and the building that we worked in. Then we all went home."

Indiana Pena was also in the group of former GOP employees seeking work on the evening of November 7. She testified that when she arrived at Building 2, "the new reps were there or the hiring personnel was there for the new owner, Mr. Fareri." She identified these people as "Mr. Raul, Rolando, and Julio." She spoke most directly with Julio Roldan. Pena testified that "several of us went up to him and told him that we were looking for work." She testified that Rolando asked if they had experience and people shouted out yes, and others shouted out no. "It was chaos." After consultation with Hernandez, Roldan said "that by orders of Mr. Fareri he did not want any employee hired from those that had worked previously to the company nor anyone that belonged to 32BJ." Indeed, on cross-examination by the Respondent's counsel, Pena testified that all three—Hernandez and both Roldan brothers "all said many times to all the employees they did not want to hire anyone who had worked for the company before nor anyone belonged to 32BJ." Roldan then said to leave our phone numbers and he gave us his number.[23]

Elidel Garfias, who also worked at GOP for AffinEco, testified similarly. She told of the coworkers going to GOP and running into "the one in charge" who came out to meet them. Then a second manager showed up. Garfias does not know their names as she never met them again. She testified that they told the employees that "They couldn't hire us because the new owner did not want anyone from 32BJ." She further explained:

> Some of our coworkers said we were here to look for work and that we had already worked there before so he went out, came back, and they said that—well, then he said that they didn't want any people that had been working for 32BJ. . . . After that on that piece of paper he gave us we wrote down our phone numbers that we would be called back.

There is some variation in the accounts: was it Julio Roldan or Raul Hernandez, or both, who opined to the employees that the new owner was not interested in hiring the former employees because of their union affiliation? Were these comments made before or after one or the other left to make a phone call? Was Rolando Roldan also present? However, the discrepancies do not undermine my conclusion that the comments of discriminatory hiring—reported by every employee who testified about these events—were made. First of all, while the employees' experiences in this situation may have differed, and they may have reached the encounter at slightly different times, and had a slightly different experience depending on where they stood and which members of management they interacted with, their accounts were credibly offered. The discrepancies do not detract from their credibility. Rather, in this instance I believe they show that their testimony was unscripted and reflected an honest effort to recount events

[23]On cross-examination by the Respondent's counsel, Pena testified that all three—Hernandez and both Roldan brothers "all said many times to all the employees they did not want to hire anyone who had worked for the company before nor anyone belong to 32BJ."

that occurred in a "chaotic" atmosphere. Notably, and significantly, both Hernandez and Julio Roldan testified extensively but neither denied making the statements at the November 7 encounter that were attributed to them about the discriminatory hiring conditions, as alleged by the employees. Thus, the employees' testimony in this regard, is unrebutted.[24] Finally, as is evident from discussion to come, the reported comments of discriminatory hiring are consistent with the facts. While such comments could have been made even if there were no discriminatory hiring, the fact that I find, as discussed below, that there was, only reinforces the plausibility of the finding that the comments were made.[25]

H. November 8, 2016: The Union continues its efforts to have former AffinEco employees considered for hire

On Tuesday, November 8, Sargent had still not heard from Fareri or anyone in the company regarding the offer of employment on the employees' behalf that she had faxed, emailed, and overnighted to the Fareri companies headquarters. Sargent decided to prepare a petition for the former employees to sign and present to Fareri. The cover letter and petition were hand delivered on Wednesday by Sargent and a group of employees.

The letter, addressed to John Fareri as owner of Fareri Associates with a copy to Kelly Pia by email, stated:

Dear Mr. Fareri:

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[24]The only possible exception would be Hernandez' negative answer to the general and leading question posed by his counsel—with no direct or contextual reference to November 7—asking "In your hiring procedure, what, if anything, did you ask applicants about their affiliation with any union." I am not sure that this denial covers the claims of the employees from November 7—after all, the encounter with the employees at GOP building 2 on that night was anything but a hiring procedure—no one was hired or even considered based on the events of that evening. In any event, this generalized testimony does not lead me to doubt the employees' testimony on the point of what was stated the evening of November 7. See, *Freeman Decorating*, 335 NLRB 103, 114 (2001) ("general or 'blanket' denial is insufficient to refute specific and detailed testimony").

[25]On brief, the Respondent's chief argument (R. Amend. Br. at 25) for disbelieving that Hernandez and Roldan made the statements attributed to them is that "[i]t is sheer insanity to believe that anybody would make such outrageous statements in public, especially during a time of labor controversy." This is not compelling. One need only casually review the last 80 plus years of NLRB cases to understand this. More specifically, I believe that the Respondent's counsel misconceives the pressures on Hernandez and Roldan when confronting a group of employees who have recently been ejected from their longtime workplace with no notice, and know full well that the new employer needs experienced cleaners. It is not surprising that under this pressure Hernandez and Roldan were not able to maintain a lawyer's composure but blurted out the truth that none of this was their fault but rather the instructions of ownership. I note further the antiunion hostility infused into the Respondent's explanation for the November 7 event. The Respondent argues (R. Amend. Br. at 25-26) that the union's efforts to petition, flyer, and encourage employees to apply en masse for work at the GOP was part of a "staged" effort to trap the Respondent in unfair labor practices, and then suggests that these union efforts to represent employees make it not "so illogical" to believe that the union "provided the [employee] 'witnesses' with the script" to lie about what Hernandez and Roldan told them. It is a revealing that the Respondent sees a union acting on behalf of its membership, and—with no other evidence at all—concludes that a conspiracy to suborn employee perjury is the logical conclusion.

> By letter dated November 7, 2016, SEIU Local 32BJ made an unconditional request for application for employment at Greenwich Office Park on behalf of the office park's service workers. Attached please find a petition signed by the office park service workers seeking application. Also, attached is a seniority list of the current employees at the facility. We reiterate our request for any specific application procedures required of the individual employees and/or for the name and contact information of the contractor, if any, you plan to use to perform the cleaning work at the site.
>
> If you have any questions or need any additional information, please contact me at [mailing address, telephone number, and email address].

Attached to the letter was a petition, dated November 8, 2016, addressed to John Fareri, which stated:

> We the building service workers at Greenwich Office Park, Greenwich, CT hereby make an unconditional request for application for employment. Please advise our collective bargaining representative, Local 323J how we may apply. You can reach Local 32BJ representatives at 733 Summer Street; Suite 401, Stamford CT 06901 or by calling 203-[xxx-xxx].

This petition was signed by 13 of the employees who had worked at GOP for AffinEco.[26]

Sargent and a group of employees hand-delivered the letter and petition to Fareri Associates on Wednesday, November 9, 2016, at the company offices at 2 Dearfield Drive in Greenwich. Upon arrival, the group asked for Mr. Fareri. The woman who met them was later identified as Cindy Jenereaux, a property manager with a title of senior vice president of property management, who is employed by GPS, and is responsible for overseeing the property management of several GPS properties in New York and Connecticut. Jenereaux told Sargent and the employees that John Fareri was not there. Sargent introduced herself and the employees and asked the woman to deliver the letter and petition to Fareri. Jenereaux agreed to do so and Sargent and the employees left.

On Friday, November 11, having heard nothing, Sargent resent the cover letter and petition, emailing it to Fareri and Pia, and also sending it by UPS for Monday delivery. The email stated:

> Hello Mr. Fareri, I hope you got attached letter and petition which we hand delivered to Cindy. Just in case you did not, I am emailing it to you. We are looking forward to your answer.

Sargent never received a response to the letters and petition she sent to Fareri. There is no evidence that any response was provided to anyone. However, Fareri testified that the email addresses were correct and that he "think[s]" he received the hand-delivered copy from Jenereaux. Fareri further testified that he was certain, after the fact, that Hernandez had it, and Fareri thought, but was not sure, that he was the one who provided it to Hernandez.

[26]The 13 were Mayra Maurad, Maria Cordero, Irma Arango, Yolanda Revilla, Elidel Garfias, Sonia Osorio, Indiana Pena, Silvia Rios, Marcela Jaramillo, Rosalia Bravo-Affon, Lucia Perez, Favian Brito, and Rosa Vasquez.

I. November 8-16, 2016: hiring continues at GOP and former AffinEco employees individually seek employment during November

As discussed above, on the evening of November 7, a group of former GOP employees approached Hernandez and Roldan seeking employment. Notwithstanding that Hernandez admitted at trial that "all someone had to do to get hired for the position [as a cleaner] was express an interest in it," and notwithstanding that Hernandez continued to need employees, and notwithstanding his willingness just minutes before to offer work to someone he did not know (i.e., Sargent) whom he encountered when she pulled her car to the side of the road, the experienced union-represented former GOP employees who approached him November 7, did not fare well.

As noted, instead of hiring them, Hernandez took their names and numbers on a sheet of paper attached to a pad, and then brought the list inside to the supply room and put it on the desk he maintained there. Hernandez told the employees he would call them "in case that I need anybody." He never called them, even though his need for employees only grew that first week as workers he had hired failed to reappear for work or quit, finding it incompatible with other commitments. By the time of this trial, the list of former AffinEco employees taken that evening November 7 had been lost—or, more accurately, the paper with the list had been removed from the pad of paper. Hernandez gave implausible, contradictory, and logic-defying accounts of what happened to the list.[27]

[27]While being questioned by the Respondent's counsel, Hernandez claimed that he put the list on his desk and realized "[t]he same week [of November 7] or the following week" that the list had "disappear[ed] with all the papers I have in the office." (Tr. 854). Hernandez testified that he realized the list was missing when he was looking for the list because he wanted to give it to Julio Roldan. (Tr. 854). Under questioning from the General Counsel, Hernandez reversed course, claiming that the night of November 7, he removed the list from his own desk and he gave it to Julio Roldan to keep in Roldan's desk. Asked why he did this, Hernandez's only explanation was "[j]ust for him to keep it." (Tr. 883–884). However, it turns out that Roldan did not have a desk at that time—only Hernandez did (Tr. 1118), which means Hernandez did not give the list to Roldan to keep in his desk. Hernandez tried (Tr. 884–885) but could not explain why he would give the list to Roldan, as Hernandez also claimed—in a transparent effort to hew to the Respondent's litigation position that Roldan was not a statutory supervisor—that he—not Roldan—was responsible for hiring. He noted that Roldan worked during the daytime at GOP, but then admitted that the week of November 7, he (Hernandez) hired additional employees on Tuesday and Wednesday evening, when Roldan, who supposedly had the list (in a desk that did not, in fact, exist), would not be there. He also admitted that more generally when an applicant came looking for work he kept the information on his desk, and if Julio Roldan received applicant information he would give it to Hernandez. The sole exception to this procedure was, according to Hernandez, the applicant information he took from the former AffinEco employees the evening of November 7 (Tr. 887). Although he could offer no reason for having given the list to Roldan, and although it contradicted his early testimony (854), Hernandez insisted that "I left it [the list] with Julio" (Tr. 885). Hernandez then testified that, although he was hiring the week of November 7, he did not ask Roldan for the list back or realize it was missing until a week or two later, at which time Roldan could not produce the list (Tr. 886). For his part, Roldan denied ever having been given the list (Tr. 1108–1109) and maintained that he never saw the list again after November 7, when Hernandez took it from the employees. Roldan claimed that on Wednesday, November 9, they looked for the list on Hernandez' desk but could not find it. (1118–1119). I cannot see any reason to believe anything Hernandez says about this list.

Hernandez continued to hire workers that week, and the next, although he admits that none were hired that first week who told him that they had worked at GOP or that they had been represented by the Union. (Tr. 753–758.)

Ultimately seven former AffinEco union employees were hired individually in November. With one exception—and she dealt only with Roldan and not with Hernandez—none of them revealed their past union affiliation. One was hired not as a part-time cleaner, like the others, but as a higher-paid full-time porter. As discussed below, three of those seven were discharged by the end of November under highly suspicious circumstances. The former AffinEco employees hired in November are described below:

Indiana Pena had worked for AffinEco, and was part of the November 7 group that came to building 2 of the GOP in the evening looking for work. Pena returned alone the following day about 6 p.m. on Tuesday November 8, and spoke with Hernandez, with Julio and Rolando present. In contrast to the claims made to the group of former AffinEco employees the night before that the Respondent was not presently hiring, Hernandez offered Pena work, offering her $10 an hour, to be paid in cash. Pena did not fill out any application forms. She started that day.

Ana Elicea, a former AffinEco cleaner who had also gone with the group to try to get hired Monday evening, was hired the next day when she went to the GOP alone the morning of Tuesday, November 8. She had called earlier in the morning and spoke with Hernandez who told her he was already at GOP. She went there and asked for work. Hernandez asked if she had worked there previously and she said yes. However, Hernandez also asked if she had had a union when she worked there. Elicea told him no. In contrast to the claim the night before that the Respondent was not hiring, Hernandez hired her on the spot. Later, when Hernandez obtained application forms he had employees fill them out retroactively. Elicea did so, on November 21, leaving out any mention of her work with AffinEco in the application, which asked for a listing of prior work experience, and directed that “your current or most recent employment” be listed first. Instead, Elicea listed a cleaning job that ended in June 2015 at an unrelated employer. As discussed below, soon thereafter (either in November or December), Hernandez learned that Elicea had lied about her previous unionized status and he (or Roldan) chastised her for it and took the opportunity to solicit her to identify other union adherents in the workforce. (More on that, below.)

Maya Maurad, a former AffinEco cleaner at GOP applied on November 15. She spoke with Hernandez and he confirmed that they were hiring. She picked up an application, accompanied by Rosalia Bravo-Affon, and returned it the next day, beginning work that evening. On her application she omitted reference to prior employment at GOP, writing down as her most recent employment an address of an AffinEco-cleaned building that was not GOP. She gave the address of that building, but “I didn’t write AffinEco because I was afraid that I wouldn’t be hired.”

Rosalia Bravo-Affon was hired after she placed a call to inquire about employment and was told that they were accepting application for employment.[28] Bravo-Affon, accompanied by her fellow AffinEco coworker, Mayra Maurad, went to the GOP on the next day. They were given applications and told to complete them and return them the following day. She testified that she did not believe Roldan or Hernandez remembered her from the November 7 gathering. While there, Bravo-Affon “saw some coworkers that I knew [from AffinEco], but they pretended not to know me.” On November 16, the two applicants went to the GOP to submit their applications.

[28]This conversation might have been with Roldan or with Hernandez. Compare Tr. 186 with Tr. 628.

Bravo-Affon's application omitted any reference to AffinEco (or any of its affiliated companies) in the section of the employment application seeking employment history and asking the applicant to "list your current or most recent employment." Mayra Maurad was hired, but Bravo-Affon was told to call the next day. Bravo-Affon called for several days, but on November 21, getting no answer when she called, and eager to work, she went back down to the GOP. Raul and Julio told her there was work and she turned in her completed application. She was hired to work in Building 5, which was the same building she worked in for AffinEco.

Miguel Eduardo Gonzalez had worked for AffinEco at GOP. After AffinEco was removed as the cleaning contractor, he heard that the new company, Fareri, was hiring there. He waited a few days and on or about Thursday, November 10, 2016, went over to GOP "looking for the person in charge of the new hires and I was introduced to Julio and he gave me work." Roldan asked him if he had worked before and Gonzalez told him yes, at 500 Putnam Avenue. Gonzalez said he told Roldan this "so that he would know that I knew something about the work," even though Roldan asked him no other questions, including about union affiliation. He did not offer that he had worked at GOP. Gonzalez was hired and still works at GOP.[29]

Former AffinEco employee Virginia Cruz was the lone employee who testified that she did not hide her past union affiliation. She was hired by Julio Roldan and did not interact with Hernandez as part of the hiring process. Cruz, who was called to testify by the employer, and continues to work at the GOP as a cleaner, testified that she was in the Monday, November 7 group that sought work at GOP. She testified that she did not see or speak with Hernandez that evening, but did see Julio Roldan, and asked for his telephone number. She testified that the next day she called Julio Roldan and came into GOP to meet with him. Cruz testified that Roldan asked if she had worked for AffinEco, and she said yes. He then found an area for her to work and she began cleaning that evening.

Another former AffinEco employee, Segundo Zuniga was hired as a "porter." Unlike the cleaners he worked days, 40 hours weekly, and was paid $18 per hour—not the $10 an hour paid the cleaners. He did not reveal on his application that he had worked at GOP or that he had been union-represented.

The record also shows that two former AffinEco employees, Nestor Trivino and Marcella Jaramillo individually applied but were not hired by the Respondent, even though their names applications were processed and their names appear on the ADP payroll list for GOP. Someone at the Respondent's offices even filled out W-4 forms for them. For unexplained reasons, they were never actually called to work. Jaramillo testified that when she spoke with Hernandez on November 16, 2016,[30] Hernandez asked her if she "had worked in the building before. And if I

[29]Gonzalez, like Cruz, said he did not meet Hernandez but was hired directly by Roldan.

[30]Jaramillo seemed sure that she went to apply on a Monday, and was directed to take an application home and return it completed. She said she took the application and returned it the following week. Her application was signed and dated by her as November 16, 2016. In her testimony Jaramillo stated that she had her application meeting with Hernandez where she picked up the application on November 7, 2016. I think it more likely occurred on November 16. The record suggests that the Employer did not have application forms to distribute as of November 7. Moreover, the hectic nature of Hernandez' schedule seems at odds with a hiring meeting on November 7, as described by Jaramillo. Based on her testimony, I believe Jaramillo met with Hernandez on Monday, November 16, took the application home and filled it out that day, and, as she testified, turned it in the following week. This would also account for the fact that her name

belonged to a union." Jaramillo testified that "I told them I had not worked there and that I did not belong to union so that I would get hired." Both Trivino and Jaramillo's names appear on the Union's AffinEco seniority list provided to Fareri Associates, and Jaramillo's name is on the petition. No explanation for the failure to call these two individuals to work has been provided by the Respondent.

J. Summary of Respondent's November hiring

The records of the Respondent's hiring and payroll are inconsistent and incomplete. In the first weeks, employees were not paid with payroll checks but with checks from Fareri, or even, personal checks from Hernandez, with no deductions. This matched the Respondent's initial uncertainty about whether cleaning the GOP itself was a temporary measure, or whether they could still find a new outside vendor. By the second week, as Sheskier put it, the Respondent knew "we're in for the long haul" and started to standardize its payroll, require written applications (some were filled out retroactively), and require I-9 authorization information from employees. This demand for enhanced documentation led to even more turnover, already high from the Respondent's willingness to hire without regard for prior experience or any other of the usual criteria. For instance, of the original six employees that worked the first weekend of November 5 and 6, only one, Vasquez, appears to have made it to the week of November 13-20. The others, presumably, had all left within the first week.

Hernandez admits that by November 21, he still had a shortage of applicants. (Tr. 849). The ADP payroll records (GC Exh. 44) for the week November 21-27, indicates that 22 employees were paid wages at the $10-an-hour-cleaner rate for that week.[31] However, the employee roster report (GC Exh. 37) indicates in handwritten notations that an additional 13 employees (again excluding higher-paid supervisors and porters) worked a variety of hours that week. That gives a figure of 35. The employee roster report, in handwritten notations, shows a total of 34 employees (again excluding porters and supervisors) worked the week of November 28-December 4, but that includes at least two employees we know were discharged that week (Maurad and Bravo-Affon). Based on these records, and based on Hernandez' testimony, at some point the workforce stabilized with a full complement that averaged about 26 workers cleaning during the week and, separately, seven or eight employees performing the "extra work" paid for directly by tenants on the weekend—together there was never more than 33 or 34 cleaners at GOP.

The Respondent maintained a full complement of approximately 33-34 cleaners at the GOP. Out of 21 AffinEco unit employees, the Respondent ultimately hired eight,[32] three of

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appears on the ADP payroll for the week ending November 27—but not for the week ending November 20—as the Employer would need the application information in order to place her name on the payroll.

[31]This excludes the Roldan brothers, the porters Ortiz and Segundo, who worked 40 hours a week (not 20 like the cleaners) and were paid significantly more, $15.50 and $18.00 an hour, respectively). It also excludes 5 individuals who were listed on the payroll, but who worked no hours, including some we know from witness testimony were never hired.

[32]Regina Cruz, Miguel Gonzalez, Segundo Zuniga, Ana Elicea, Mayra Maurad, Rosalia Bravo-Affon, and Indiana Pena. As noted, below, Irma Arango was hired by Roldan on or around December 18 at the request of a tenant.

whom[33] were quickly discharged for allegedly discriminatory reasons, one of whom was hired as a full-time day porter[34]—a fulltime position far better paid than a cleaner—and one of whom[35] was not hired until December, and then at a tenant's request.[36]

K. The discharges

The government alleges that three of the former AffinEco employees who were hired by the Employer to work at GOP were unlawfully terminated—one, Indiana Pena, on November 15, and two, Rosalia Bravo-Affon and Maya Maurad, on November 30.

1. Indiana Pena

Indiana Pena was hired November 8, worked only six days, until on November 14:

> I stopped working there because on the 14th of November Mr. Raul called me by phone and told me that I was on a list of people not allowed to work in those buildings. I told him that it wasn't important to be on that list; the only thing that was important to me was work, to be able to work.
>
> Then he asked me if I was the wife of one of the managers. I said yes, but we were separated, but that we were still married and he said okay. I worked that day like all the other days. Then on the 15th he called me again. He told me not to return to work for having worked at the previous company, for belonging to 32BJ and for being married to one of the managers.
>
> That that was an order of Mr. Fareri to return [n]ever again. And I said okay, and when can I return for my pay? He told me the following week.

Hernandez testified that Pena was not discharged, but simply stopped showing up for work. Pena sharply disputed this. ("That never happened because I never missed work"). I reject Hernandez's claim. In part, I reject it because Pena testified credibly and in detail about the stated basis for her discharge. But I also reject Hernandez' claim because when questioned about Pena, Roldan thoroughly contradicted Hernandez, testifying that Pena was discharged after many tenant complaints about her performance, on a range of issues (leaving lights on, not locking doors, forgetting trash), about which, he claimed, Hernandez spoke to her repeatedly, in his presence, and that Hernandez told him that he fired Pena "due to . . . enough complaints about her." Hernandez denied ever having any such conversations with Pena or even firing her.[37]

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[33]Mayra Maurad, Rosalia Bravo-Affon, and Indiana Pena.

[34]Segundo Zuniga.

[35]Irma Arango.

[36]Thus, 13 AffinEco cleaners were never hired. Favian Brito, Marcia Cordero, Elidel Garfias, Ivette Huguet, Joel Jacome, Marcela Jaramillo, David Narvaez, Sonia Osorio, Lucia Perez, Yolanda Revilla, Silvia Rios, Nestor Trivino, and Rosa Vasquez.

[37]Roldan also testified that Pena missed work on certain days, "enough to cause problems for us." This too is inconsistent with Hernandez' claim that Pena just stopped coming to work. Notably, Pena's paychecks refute any claim that she missed work. Her paychecks totaled $290, or 29 hours. For the week ending November 13, she was paid $210, i.e., for 21 hours, one hour

In addition, in his opening statement (Tr. 93), the Respondent's counsel gave still another version, asserting that Pena was "specifically" terminated because "she failed to remove garbage from a tenant's premises." Moreover, as referenced throughout this decision, Hernandez proved himself to be an unreliable witness in a variety of situations. In short, the Respondent's chief witnesses, and counsel, cannot keep their stories straight—they gave irreconcilable accounts that shared only the obligatory denial of an illicit motive. I credit Pena's credibly offered and—given the fundamental contradiction by each of the Respondent's witness of the other—effectively unrebutted testimony.

2. Maya Maurad and Rosalia Bravo-Affon

After beginning work on November 16, Maurad performed the same work as she had for AffinEco at GOP, cleaning Building 9. The only difference was that when she was with AffinEco she did the bathrooms in her building. With Fareri, there was one person specified to do the bathrooms on all the floors.

Bravo-Affon worked the evenings of November 21-23, 25, 28-29. She cleaned Building 5 with two other employees performing the same work she had performed under AffinEco.

Maurad and Bravo-Affon were discharged on November 30, shortly after arriving for work that evening. They were at the Building 2 "supply-closet" office where employees signed in and picked up their building keys when Julio Roldan asked them to wait and not go on to their buildings to work.

After Hernandez arrived, according to Maurad and Bravo-Affon, Roldan and Hernandez called them into the office and closed the door. The account of what Hernandez told Bravo-Affon and Maurad is pointedly disputed, beginning with a dispute over who was in the room.

Maurad and Bravo-Affon also testified that they met together with Roldan and Hernandez. Roldan testified that he and Hernandez met sequentially but separately with Bravo-Affon and then Maurad. He also testified that his brother, Rolando Roldan was present for the meeting. (Rolando Roldan did not testify. No reason for his failure to do so was provided.)

Maurad and Bravo-Affon each testified that Hernandez asked them if they had worked for the previous company. Maurad testified that they said yes and Hernandez told them that "they had a list with the name of the people that are not allowed to work there and that obviously our names were listed there." Bravo-Affon testified that Hernandez told them, "they had a list of all the workers that been working with AffinEco." Maurad testified that Hernandez told them that "they are new and they have a lot of pressure coming from the new boss and they don't want any trouble."

In addition, Maurad testified that Hernandez announced that "also there were complaints about us" or, as Bravo-Affon testified, "in addition, each one of us, there have been complaints about us."

more than the standard 5 day X 4-hour-per-day workweek. Her check for the week ending November 20, was for $80, indicating two days work. She was let go after working November 14. There was no work missed.

Bravo-Affon testified, "[i]n my case they said that I had left a trash can that I didn't throw out." Both Maurad and Bravo-Affon testified that Hernandez told Maurad that she "had tossed out some papers that [she] wasn't supposed to throw away."

Maurad asked Roldan to show her the complaints—he showed her "some kind of text wording" as Bravo-Affon put it. Maraud agreed that she was shown a paper, but testified that she did not see what building or floor the complaints were from. Maurad protested to Hernandez "that it was the first time I have heard that because of one complaint they were firing"—Maurad understood that it took three complaints before someone was fired.[38]

Bravo-Affon testified that she responded that "you are tossing us . . . because we have worked for the previous company, not because I threw out the trash can." Both testified that Bravo-Affon told Hernandez and Roldan that "we knew that we were being fired because we have a Union and because we had worked in the company before." Hernandez denied this, stating, "that there was no problem with that."

Hernandez testified that he fired Maurad because of performance issues, specifically, "[s]he was not properly cleaning." However, he did not give a detailed account of what transpired at the November 30 meeting. Roldan did. According to Roldan, Hernandez told Maurad that "unfortunately we had to let her go due to the continuous complaints received." Roldan testified that "[w]e explained the reason behind each complaint and the many times we explained [to] her the reason for complaint, plus the complaint that this lady was throwing the recyclable papers and she was throwing them away." Roldan testified that Hernandez told Maurad that the problem had been "explained to her three, four, or five times." Roldan recalled no other reasons given for her discharge, "[i]t was just that which was a big problem." Roldan claimed that he had been with Hernandez when they had tried in past, in response to complaints, to show Maurad the papers that were not to be thrown out. Roldan claimed that Maurad had had this explained to her "three, four, or five times."

As to Bravo-Affon, Hernandez also gave no account of his November 30 meeting with her, other than to confirm that he fired her for what he claimed were three instances of her setting off alarms in Building 5. Hernandez testified at trial that this was the only issue with Bravo-Affon.[39] Hernandez claimed that he heard from Kelly Pia on November 22, that a tenant in Building 5, XPO, complained that someone left a door ajar and it set off an alarm. He claimed he spoke to Bravo-Affon on November 23, and Bravo-Affon admitted leaving the door ajar when she went to the bathroom. Hernandez says he reported this to XPO (but could not remember the name of the person to whom he reported it). Hernandez said that on Friday, November 25, he found the door ajar again and concluded it was Bravo-Affon's fault, because she was the only one working in that section. Hernandez claimed that the tenant also complained by email to Kelly Pia. He testified that he raised it with Bravo-Affon and she apologized again. Hernandez said that on the evening of Monday, November 28, there was a tenant complaint that the silent alarm had been triggered again. Pia spoke with Hernandez the next day and that day, November 29, Hernandez claims he

[38]This understanding was based on the practices and policies in place during Maurad's nine years with AffinEco. However, Hernandez admitted in his pretrial affidavit that before firing an employee he usually gives them two warnings and then "If they made a mistake a third time, then they would be terminated." GC Exh. 51 at 6-7.

[39]However, in his sworn pretrial statement he attributed other cleaning-related deficiencies to her performance. Hernandez' affidavit also states incorrectly that Bravo-Affon worked in Building 6 and that Maurad worked in Building 5.

spoke with Bravo-Affon, who told Hernandez "I'm sorry, but I have to go to the bathroom and it's easier for me not to use the key so many times, that's why I leave it open."

The following day, Hernandez fired her. Roldan testified that he had been present "at one or two" of the previous meetings at which Hernandez verbally warned Bravo-Affon for setting off alarms. Roldan attributed the complaints about alarms at issue to a tenant named Anita Winkly, although Roldan said he never saw the emails from her. Roldan testified that at the November 30 meeting Hernandez told Bravo-Affon that:

> unfortunately he had to fire her due to the number of complaints that we had and he described specifically each complaint. And he said that he was the fourth or fifth time that he was explaining [to] her the same thing. And that he didn't think that she could remember what she was supposed to do in her area because she had worked there before with the prior Company. Plus we, myself personally, had explained to her what she had to do there.
>
> One of the bigger problem was the door and the alarm. With that Company you could not leave the door open for more than five seconds because the alarm gets activated automatically and silently. And that had happened several consecutive times that week. And [Greenwich] Premier Services had started to pay each time the alarm went off. That was the reason.

Roldan also testified that Hernandez told Bravo-Affon that the complaints at issue "had reached not just the property manager but possibly headquarters."

Bravo-Affon denied that in the Nov 30 meeting Hernandez told her she had set off alarms, or that he had received complaints about alarms from tenants, or that complaints had been received about toilet cleaning. Bravo-Affon denied that Hernandez ever talked to her or warned her about alarms or doors left open in the past.

As to Maurad, Hernandez claimed that "[w]e received a complaint from [a] tenant that she worked, that she was leaving behind garbage and she was throwing out papers that she was not supposed to throw out." The tenant that allegedly complained was "Toni" from ONS, in Building 9. Hernandez testified that Toni had complained by email to Kelly Pia, and Pia informed Hernandez about the complaint, but did not show him the email. Hernandez checked with Toni and she told him that "the day before there was paper with a sign that was not supposed to be thrown out, the papers were not there." Hernandez also claimed that he talked to Julio Roldan about it. Hernandez testified that he talked with Maurad about it the same day that Pia raised it with him, and that Maurad said she was sorry for having thrown out the papers and that she forgot to take out the garbage. She said she was "going to pay more attention." Two days later, Hernandez testified that he was told that Toni had told Pia that the papers that were not supposed to be thrown out were thrown out again. Hernandez testified that he talked with Maurad, and Maurad denied it. Hernandez admitted he had no proof that Maurad had done it, but she was "in charge for that section" of the building. A third time, garbage was not picked up from behind two desks at ONS. Hernandez told Maurad and she told him "I didn't see it." This third incident resulted in her discharge.

Obviously, Maurad and Bravo-Affon's account of the termination meeting diverges sharply from what Hernandez, and especially Roldan—who testified more directly about the events at the meeting—claim occurred.

In considering their comparative credibility, I note that both Bravo-Affon and Maurad testified with a credible and truthful demeanor. Their accounts were mutually corroborative, but did not feel scripted. They did not overstate, but appeared to be doing their best to recall events. Hernandez and Roldan were impressive in their own ways—but they presented with a demeanor that appeared committed to a particular version of events, even when their accounts appeared implausible or inexplicable. This happened time and time again. Moreover, as with their discussion regarding Pena's discharge, and the "disappearance" of the list of former AffinEco employees seeking work, each of their testimonial accounts relating to Bravo-Affon and Maurad is painfully inconsistent with the others.

In addition to the superior testimonial demeanor of Bravo-Affon and Maurad, with regard to the November 30 discharges, it makes sense to consider the plausibility and consistency of the underlying claims that Hernandez and Roldan are making in their testimony. In other words, if the charges against Maurad and Bravo-Affon that Hernandez and Roldan claim they made against the women in the meeting are unsupportable, it is less likely they actually conveyed that information to Maurad and Bravo-Affon in the meeting, and conversely, more likely that Maurad and Bravo-Affon's version of events is correct. In fact, engaging in this exercise to review their claims against Maurad and Bravo-Affon turns out to be seriously undermining to Hernandez and Roldan's accounts.

In the first instance, it is notable, and significant, that although central to the Respondent's explanation for these discharges, none of this was corroborated, and indeed, much of it is contradicted by the record. Thus, the ONS tenant who Hernandez identified as repeatedly complaining to Pia did not testify. Kelly Pia did not testify. No explanation for their absence was offered.[40] In other words, the Respondent did not, or felt it should not, provide the testimony of the relevant people involved in the incidents that Hernandez said led to Maurad's discharge, incidents that Maurad sharply disputed ever happened, much less that she was warned about. Particularly, in the face of Maurad's credibly-offered testimony that she was never spoken to about any complaints or deficiencies in her work (until the actual discharge), the Respondent failed to offer what would seem to be obvious corroboration.

Even more concerning, although Hernandez testified (Tr. 841) that three email complaints came into Pia from Building 9 tenants under Maurad's charge, before she was fired—*none* was produced. These complaints were the subject of a subpoena. But the Respondent could produce only one written complaint—from November 30, the day Maurad was fired, which is likely the one that Maurad and Bravo-Affon testified that Maurad was shown in her termination meeting. But there appears to be nothing before that. The November 30 note—to Julio Roldan—from Toni Petrucci at ONS—stated that:

> Building 9, has reported that a few of their HIPAA containers (that contain patient documents) have been emptied and replaced with garbage bags. I can't stress enough the importance to not discard any documents form these containers. The containers were properly marked "HIPAA for Shred Only."
>
> PLEASE pass this on to your staff.

This November 30 note does not contain a hint of suggestion that this or any other matter had previously been brought to the attention of Pia, Roldan, Hernandez, or anyone else. There is

[40]I recognize that Pia is a former employee but this does not in any way establish that she is unavailable to testify. No such claim was even made.

no hint of a problem with failing to take out garbage. It is hard to square Hernandez' testimony with the lack of documentary support that, by his own account, should exist.

Further, Hernandez' explanation for terminating Maurad that was offered at trial shifted from that offered in his sworn pretrial affidavit provided November 28, 2017, nearly one year before trial. As noted, at trial, Hernandez claimed that Maurad's offenses that led to her discharge included the failure to collect and throw out garbage. However, in his affidavit, this was not mentioned as an issue. Rather, in his affidavit, Hernandez complained that the performance issues involved, in addition to throwing out documents that should not have been thrown out, "she was setting off alarms." Indeed, in his affidavit, Hernandez stated that "[mo]st of the complaints about Building 9 were about setting the alarm system off." Hernandez asserted in his affidavit that he "traced the complaints back to . . . Maurad." This was once a defense—the claim that Maurad was terminated for setting off alarms is contained in the Respondent's January 20, 2017 position statement to the NLRB investigator (see, GC 54 at 4 fn. 4), but this version of events appears to have been dropped at trial. Roldan too, did not know of any such charges having been made against Maurad and does not recall it being mentioned in her termination meeting. The attribution at trial of new offenses against Maurad and the omission of the primary one against her advanced in the sworn pretrial statement obviously does not enhance—it hurts—Hernandez' credibility.

Of course, below, we will return to an analysis of the motive for Maurad's discharge. But suffice it to say here, that tangle of inconsistencies and lack of support for the claims against Maurad weigh in favor of rejecting Hernandez' and Roldan's versions of what they told Maurad at the November 30 meeting. Given this, as well as the credible demeanor displayed by Maurad in her testimony, I believe Maurad's version of events over the claims of Hernandez and Roland.

Similar considerations apply to the clash between Bravo-Affon's account of the November 30 meeting and Hernandez' and Roldan's testimony about it. Hernandez' testimony is undermined by the fact that the only Building 5 complaints the Respondent produced in response to a subpoena do not track his testimony, and do not inculpate Bravo-Affon in repeatedly setting off alarms. Hernandez claimed that he terminated Bravo-Affon after tenant complaints about alarms set off on November 22, 25, and November 28. However, none of these were corroborated in any way. Not by Pia—she did not testify. Not by any email from a tenant complaining, or any emails from Pia, or any documentation at all. This despite the fact that Hernandez testified that at least one of the complaints to Pia—the one on November 25—was made in an email to Pia. (Tr. 822.) There was a problem with alarms going off—7 instances are cited in the November 29, 2016 memo from an official at a Building 5 client complaining about the problem. But only one, the last one—November 28, at 8:06 p.m., coincides with a date when Bravo-Affon was working. The other five precede her hire date and one is on a Saturday when she did not work. Moreover, Hernandez admitted that the person or persons responsible for these alarms going off was not Bravo-Affon, and he further admitted that the persons responsible were not fired but transferred to other buildings. No explanation was offered by Hernandez or by the Respondent for this discrepancy in treatment, or why tenant complaints are documented except for the ones allegedly made against Bravo-Affon. Below, we will return to the implications of this (and other evidence) for assessing the motive for the Bravo-Affon discharge. For now, I note only that it makes more likely that Bravo-Affon's account of the November 30 meeting is accurate compared to Hernandez' and Roldans' which carry with it the implausibility of the claims they are asserting.

Thus, I credit Maurad and Bravo-Affon's accounts of the November 30 discharge meeting.

L. Response to union activity, interrogation of Elicea and request that she identify union supporters

The Union initiated a number of rallies and issued a series of flyers beginning on or about November 16, 2016, in response to the Respondent's failure to hire the former AffinEco employees. Maurad's credible and unrebutted testimony is that on November 18, when she arrived at work, Hernandez assembled the workers together. He told them that

> he had seen a lot of us there . . . at the protests outside of the building and he told us that each person is free to make their own decisions, but that for him the Union . . . is like the birds, that they fly and fly, but they never land in any determined destination, that they are a new company and that they have different system of working.

Subsequently, undated in the record, but most likely between mid-November and mid-December 2016, when the Union was rallying and leafleting over the Respondent's failure to hire the union-represented cleaners, Hernandez showed Elicea one of the flyers and asked her if she knew anyone in the photograph. Elicea had been hired as a cleaner by Hernandez on November 8, after she told Hernandez she had not had a union when she worked at GOP in the past. In response to Hernandez' request that she identify people she knew in the photograph in the Union's flyer, Elicea identified herself—pointing to an individual whose face was hidden behind others in the photograph. Hernandez or Roldan asked Elicea "why I had lied about being in the Union." Elicea told them that "if they had known that I was in the Union they probably would not have hired me." When Hernandez asked if she knew anyone else, she told him no. Hernandez chuckled and walked away. Sometime later, either Hernandez or Julio Roldan showed a letter with a list of names of her co-workers from AffinEco. Like the petition, provided to Fareri on November 9, (GC Exh. 6), the list she was showed was headed with the name of Mayra Maurad. Shown the petition at trial, Elicea was not sure whether or not it was the document she had been shown, although no other document was introduced or alluded to by any witness of the Respondent. It is more likely than not and I find that it was the petition provided to Fareri on November 9. Regardless, undisputed is that Hernandez or Roldan asked Elicea "to go building-by-building to identify the ones that were . . . on the list." Elicea refused and told them "no, because nobody's getting fired because of me. I told him that if it's up to me that he could just fire me because . . . I don't know what anybody's else's personal situation is . . . to risk having them get fired because of me."[41]

M. The Respondent's July 1, 2017 contracting out of the GOP cleaning work to IBM

The Employer continued to perform the cleaning at GOP until the last day of June 2017. On July 1, 2017, Integrated Building Management (IBM) took over the cleaning responsibilities pursuant to a contract with GPS. The Fareri companies continue to own and lease the same GOP buildings. Upon IBM's assumption of the cleaning contract Hernandez ceased managing the cleaning at GOP, remaining as manager of housekeeping for J House. Julio Rolando

[41]Hernandez broadly denied ever talking to any of the workers about people who were distributing flyers. To the extent that this vague denial is intended to contradict Elicea's testimony, I discredit Hernandez' response. See, *Freeman Decorating Co.*, 335 NLRB 103, 114 (2001) ("general or 'blanket' denial is insufficient to refute specific and detailed testimony"). Neither Hernandez nor Roldan more specifically addressed Elicea's testimony. I credit Elicea's credibly offered testimony.

remained on the Respondent's payroll for another month and then continued at GOP in charge of the cleaners, but now working for IBM. Rolando Roldan also remains at GOP for IBM.

None of the Respondent entities recognized the Union as the cleaners' collective-bargaining representative during any of the period of time in which the Fareri companies owned GOP and performed the cleaning. When the cleaning was contracted to IBM, no notice or opportunity to bargain over the transfer of the cleaning work to IBM was provided to the Union.

N. August 2018 interviewing of witnesses by counsel

During trial, several of the employee witnesses called to testify by the Respondent testified during their cross-examination that shortly before the hearing in this case the Respondent's trial counsel met with and questioned them on terms that appeared to ignore the safeguards required by the Board for interviewing of employee witnesses in preparation for an unfair labor practice defense. *See Johnnie's Poultry Co.* 146 NLRB 770 (1964). On October 31, 2018, the General Counsel moved to amend the complaint to add an unlawful interrogation allegation. The motion was granted.

The relevant facts involve a pretrial meeting by the Respondent's counsel with GOP cleaners, by then working for IBM, but who had worked cleaning GOP for the Respondent. The date of the meeting is unspecified in the record, although it was represented by Attorney Harras to the administrative law judge at the hearing that it was "in sometime August."[42]

One evening in approximately August, 2018, when they arrived at work, a number of employees: including, Virginia Cruz, Miguel Gonzalez, Irma Arango, and probably Anna Elicea were given subpoenas to attend the hearing by their supervisor at GOP, Julio Roldan. Roldan told them that "they had received these letters in connection with the Union case against Fareri." Roldan testified that he had received instructions to deliver the subpoenas from his boss at IBM, Chris Greco.

At a later date, Roldan told the subpoenaed employees that there would be a meeting coming up in which they would meet with the attorneys. Roldan did not know when, and told the employees "[t]hat I would tell them about the time and date of the meeting at a future time." He provided no other information or assurances at that time, other than to tell them the meeting would be half an hour or an hour prior to their evening shift. Subsequently, Roldan told the employees the date and time of the meeting and told them "[t]hat they need to attend at the exact time on the given day with the Representatives of Mr. Fareri." Gonzalez testified on cross-examination that Roldan told him that he needed to meet with the company's lawyer because "he would have some questions" similar to the "same thing that I was asked just now," i.e., the

[42]The General Counsel (GC Br. at 86) points out that

> Such group questioning of testimony also seems to run afoul of Respondents' concurrent "sequestration" request to the judge, asking the judge for an order instructing "any person who may appear as a potential witness in matter to not discuss their testimony with one another (Tr. 96).

The hearing did not open until August 29. The sequestration order was entered August 30. Attorney Harras represented that the meeting with employees occurred "sometime" in August. There is no other evidence as to when the meeting occurred. Absent evidence that the meeting occurred after August 30, there is no violation of the sequestration order.

questions he was asked at the hearing by counsel. Gonzalez testified that they were told to report early for work on a certain day and that the attorneys "were going to ask us a few questions."

Roldan maintained in his testimony that the meeting "was voluntary because they were never told that it was mandatory," but he also made clear that he did not tell employees the meeting was voluntary. One employee, Cruz, testified that she was told by Roldan that she "could go or not go" to the meeting. However, another employee at the meeting, Gonzalez, testified that he was not given an option not to participate by Roldan, and not told by the attorneys when they conducted the meeting that he had the option not to attend the meeting.

On the appointed evening, not specifically named in the record, employees Arango, Gonzalez, Elicea, and Cruz, met with Attorneys Harras and Heidecker in an office in Building 2. Ronaldo Roldan, their supervisor at IBM, attended and interpreted. Arango also performed some interpretation during the meeting.

There were no assurances that there would be no reprisals for refusing to answer any questions. According to Gonzalez, at the meeting the attorneys did not tell the employees why they wanted to ask the employees questions, or say anything about nonreprisals should the employees refuse to answer questions or anything about nonreprisals for the answers given.

Gonzalez testified that the evening of the meeting "the attorneys arrive[d] and they ask us the same questions and that was that." Gonzalez testified that "We showed up and they began to ask questions, the same questions that were asked earlier." Gonzalez testified that the employees answered the attorneys' questions. "They answer whatever was asked." Gonzalez indicated that the questions were similar to that asked at the hearing. The meeting was a group meeting and each employee heard the questions posed by the attorneys to the other employees and the other employees' answers to the attorneys' question. There was discussion in the meeting of "how the supervisors had treated us . . . when we appl[ied] for work." They were asked about "how the interview had gone when we requested work the first day" and each employee explained what had happened to them during the interview. The employees were asked if they had worked for a Fareri company before and, more generally, asked the same type of questions they were later asked at the hearing. Gonzalez testified that the attorneys "said I would have to come to court here."

Analysis

8(a)(1) allegations[43]

The government alleges that certain statements and conduct by the Respondent's agents, Hernandez and Roldan, in November and December 2016, constitute independent violations of Section 8(a)(1) of the Act.[44]

First, the government alleges (paragraph 12(a) of the complaint) that the Respondent, through Hernandez and Roldan, unlawfully interrogated job applicants about their union and other protected activity in violation of Section 8(a)(1) of the Act.

As I have found, this occurred numerous times. When Marcella Jaramillo applied, on or about November 16, Hernandez asked her if she "had worked in the building before. And if I belonged to a union." On or about November 8, Ana Elicea had a similar experience, with Hernandez first asking if she had worked at GOP previously and then asking if she had a union when she worked there. Further, when the group of former AffinEco employees sought work at the GOP the evening of November 7, 2016, they were asked by Roldan and Hernandez about their prior experience at GOP—and when they answered yes, some even yelling out the name of the specific building in which they had worked—they were told that the "the owner," "Mr. Fareri," did not want anyone who had previously worked there or who belonged to 32BJ or the union. Other employees, such as Virginia Cruz, were asked if they had worked previously for AffinEco.

It is well settled that "questions concerning former union membership and union preference, in the context of a job application interview, are inherently coercive, without accompanying threats, and therefore violative of Section of the Act, even when the interviewee is subsequently hired." *Rochester Cadet Cleaners, Inc.*, 205 NLRB 773, 773 (1973 *Challenge Cook Bros.*, 288 NLRB 387, 397 (1988); *Service Master*, 267 NLRB 875, 875 (1983) (and cases cited therein).

Moreover, the questioning about prior experience—under the circumstances here where the Respondent was keenly aware of the unionized status of the predecessor—would reasonably (and accurately) be understood as itself an inquiry into the former employees' recent union affiliation. Indeed, these questions about prior work at GOP were often followed up by express statements by Roldan and Hernandez that equated past employment at the GOP with union affiliation and unlawfully announced the Respondent's commitment to discriminatory hiring. Such statements are independently unlawful and make clear that the questioning of prior employment was part of a coercive interrogation. Accordingly, I find that the allegation in paragraph 12(a) has been proven by the General Counsel.

[43]The *Johnnie's Poultry* 8(a)(1) allegation, which is based on events occurring 8-9 months after the other 8(a)(1) allegations, and which was added to the complaint mid-trial through motion, is considered separately, below.

[44]Julio Roldan's supervisory status under the Act, which is alleged by the General Counsel and denied by the Respondent, is considered below in a separate subsection of this decision. As discussed therein, I find that Julio Roldan was at all relevant times a statutory supervisor and agent of the Respondent under the Act

The General Counsel and Union also argue on brief that Hernandez's statement that "at the new company they don't have a union, that they are direct contractors," amounts to a statement of an intent to discriminate in hiring, as the Respondent was actively hiring and was effectively telling the former employees that it intended to discriminate against them. As the Board explained in *Kessel Food Markets*, 287 NLRB 426, 427 (1987), reversing the judge's contrary conclusion:

> Under *Burns*, the purchasing employer has an obligation to recognize and bargain with the union if a majority of the purchaser's employees were previously employed by the seller and were represented by the union. Thus, the employer does not know whether it will be union or nonunion until it has hired its work force. When an employer tells applicants that the company will be nonunion before it hires its employees, the employer indicates to the applicants that it intends to discriminate against the seller's employees to ensure its nonunion status. Thus such statements are coercive and violated Section 8(a)(1)."

enfd. 868 F.2d 881 (6th Cir. 1989). See also, *Pressroom Cleaners*, 361 NLRB 643, 666–668 (2014) (in successorship hiring situation, stating to prospective employees that Respondent is nonunion is coercive and unlawful).

Moreover, as the General Counsel contends on brief, Hernandez' statements conveying that the owner did not want anyone who previously belonged to the union—in a gathering where employees were seeking work—is, under the circumstances, also an unlawful threat of intent to discriminate.

Accordingly, I find that Hernandez' statement that "the new company" doesn't have a union and his statements that the new owner does not want anyone who previously belonged to the Union constitute unlawful threats to discriminate.[45]

The General Counsel also contends (paragraph 12(b)) that the Respondent unlawfully told employees that they could not continue working at the GOP because they had previously worked at AffinEco and/or because of their union membership.

As found above, Pena was told by Hernandez on November 14, that she was on a list of people not allowed to work at the GOP. On November 15, Hernandez called Pena again and told her not to return to work because she had worked for the previous employer and had belonged to 32BJ (and because she was married to one of the former AffinEco managers). Hernandez told her "that was the order of Mr. Fareri." In addition, Bravo-Affon and Maurad were asked on November 30, if they had previously worked at the GOP and when they said yes, Maurad described how Hernandez told them that "they had a list with the name of the people that are not allowed to work there and that obviously our names were listed there." Bravo-Affon testified that Hernandez told them, "they had a list of all the workers that been working with AffinEco." Maurad testified that Hernandez told them that "they are new and they have a lot of pressure coming from the new boss and they don't want any trouble."

These are flat and express violations of Section 8(a)(1). Telling employees they are being discharged because of their union affiliation obviously would tend to interfere and coerce

[45] I find that this additional violation—which is unpled—is closely connected to the complaint's subject matter, and has been fully litigated. *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

employees in Section 7 activity and is unlawful on its face. See, *Erickson Inc.*, 366 NLRB No. 171, slip op. at 1–2, fn. 5 (2018); *Triple PlaySports Bar and Grille*, 361 NLRB 308, 308 fn. 2 (2014) (independent 8(a)(1) violation to tell employee that protected activity is reason for discharge); *Benesight, Inc.*, 337 NLRB 282, 283–284 (2001).

Finally, the General Counsel alleges (paragraph 12(c)-(e) of the complaint) that the Respondent unlawfully questioned employees about their union and protected activities, and about the identity of other employees engaged in union and protected activities, and created the impression that employees' union activities were under surveillance.

As found above, Hernandez showed Elicea one of the union's flyers and asked her to identify people in the photograph. She identified herself, and Hernandez or Roldan asked her "why I had lied about being in the Union." Elicea told them that "if they had known that I was in the Union they probably would not have hired me." Hernandez asked her if she knew anyone else in the union's photograph—Elicea told him no. Sometime later, either Hernandez or Roldan showed Elicea a copy of the petition that the Union had delivered to John Fareri and asked Elicea "to go building-by-building to identify the ones that were . . . on the list." Elicea refused.

I agree with the General Counsel that this incident involves an unlawful interrogation about Elicea's union activity and about the union activity of others.

While not every interrogation is unlawful under the Act, and questioning must be considered under all the circumstances (*Rossmore House*, 269 NLRB 1176, 1178 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985); *Westwood Health Care Center*, 330 NLRB 935, 939 (2000)), here the circumstances provide nothing to recommend these interrogations. Conducted in the midst of and as part of a panoply of unlawful conduct—most of which involved getting rid of or avoiding hiring the union-represented former AffinEco employees—it is beyond cavil that there was no legitimate purpose for these interrogations, undertaken by the top onsite day-to-day supervisors at the GOP. Elicea was not a known union supporter—indeed, like many of the former AffinEco employees, she had hidden her former AffinEco and union status when applying for work, as Hernandez and/or Roldan noted to her. In general, it is unlawful for an employer to inquire as to the union sentiments of its employees. *President Riverboat Casinos of Missouri*, 329 NLRB 77 (1999). That is certainly true in the circumstances here. I find that the Respondent violated the Act as alleged in paragraphs 12(c) and (d) of the complaint.

Moreover, the request for Elicea to go building-by-building identifying petition-signers was an obviously unlawful and coercive demand, reasonably understood as setting the stage for further acts of discrimination. I find that request to be independently illegal. Though not specifically pled, the incident is closely connected to the complaint's subject matter and has been fully litigated. *Pergament United Sales, Inc.*, 296 NLRB at 334.

Finally, I dismiss the "impression-of-surveillance" allegation in paragraph 12(e). The General Counsel contends (GC Br. at 132–133) that asking Elicea to help them ferret out union adherents creates an unlawful impression of surveillance. I disagree.

It is well established that,

> [i]n determining whether an employer has unlawfully created the impression of surveillance of employees' union activities, the test that the Board has applied is whether, under all the relevant circumstances, reasonable employees would

> assume from the statement in question that their union or other protected activities had been placed under surveillance.

Frontier Telephone of Rochester, Inc., 344 NLRB 1270, 1276 (2005), enfd. 181 Fed. Appx. 85 (2d Cir. 2006).

The effort to have Elicea expose union supporters is obviously illegal, as I have found. But it does not also independently or separately create the impression that the Respondent has been engaging in surveillance.[46]

8(a)(3) allegations

The government alleges that the Respondent's refusal to hire or consider former AffinEco unit cleaners for hire was unlawfully motivated in violation of Section 8(a)(3) and 8(a)(1) of the Act.[47]

The government further alleges that the discharge by the Respondent of three former AffinEco employees who were hired—Maurad, Bravo-Affon, and Pena---was also unlawfully motivated in violation of Section 8(a)(3) and (1) of the Act.

Hiring discrimination

A new owner of an operation is not obligated to hire any of its predecessor's employees, but may not refuse to hire the predecessor's workers because they were represented by a union or to avoid having to recognize a union. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *Howard Johnson's v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974).

The Supreme Court-approved analysis in cases turning on employer motivation was established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Management. Corp.*, 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis). In *Planned Building Services*, 347 NLRB 670 (2006), the Board held that *Wright Line* provides the appropriate framework for deciding whether a successor employer violated Section 8(a)(3) by refusing to hire predecessor employees. In *Downtown Hartford YMCA*, 349 NLRB 960, 960 (2007), the Board explained:

> To establish a violation of Section 8(a)(3) under *Wright Line* where a refusal to hire is alleged in the successorship context, the General Counsel has the burden of showing that the employer failed to hire employees of its predecessor and was motivated by antiunion animus. Once the General Counsel has made this showing, the burden shifts to the employer to demonstrate that it would not have

[46]I note that neither the General Counsel or the Union contend that Hernandez' November 18 announcement to the assembled workforce that "he had seen a lot of" the employees at the union protests, constitute the creation of an impression of surveillance. In the absence of argument, I do not reach that issue.

[47]As any conduct found to be a violation of Section 8(a)(3) would discourage employees' Section 7 rights, a violation of Section 8(a)(3) is also a derivative violation of Section 8(a)(1). *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 fn. 4 (1983); *Chinese Daily News*, 346 NLRB 906, 933 (2006), enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007).

> hired the predecessor's employees even in the absence of its unlawful motive. [citation to *Planned Building Services*, supra, omitted].

The General Counsel's proof of unlawful motivation can consist of factors such as

> Substantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine.

U.S. Marine Corp., 293 NLRB 669, 670 (1989) (citations omitted), enfd. 944 F.2d 1305 (7th Cir. 1991).

The General Counsel's proof of unlawful motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd. 184 Fed. Appx. 476 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

In this case, the evidence of violation is overwhelming. In part, this is due to the direct evidence of anti-union animus infecting the hiring process. In part it is due to the inconsistent hiring practices towards those the Respondent knew to be former AffinEco employees and those it did not. In part, it is due to the complete lack of plausible legitimate explanation for what would be—absent discriminatory motive as an explanation—the employer's remarkable ability to avoid and deflect the experienced and available former employees' efforts to be hired at a time when it was desperate to hire anyone it could find.

First, the record is clear that the Respondent failed to ever hire 13 of the former AffinEco employees. Thus, the record shows that the Respondent never hired Favian Brito, Marcia Cordero, Elidel Garfias, Ivette Huguet, Joel Jacome, Marcela Jaramillo, David Narvaez, Sonia Osorio, Lucia Perez, Yolanda Revilla, Silvia Rios, Nestor Trivino, and Rosa Vasquez.[48] Moreover, the record shows that eight former AffinEco employees managed—in most cases by hiding their prior credentials—ultimately to obtain employment at various times after the Respondent began cleaning the GOP.

Second, that anti-union animus motivated the Respondent's hiring is powerfully obvious on this record. Although the Board frequently must rely on circumstantial and indirect evidence to establish motive in unlawful refusal-to-hire cases, that is not the case here. There are also direct admissions. Thus, the credited evidence is that Hernandez and Roldan repeatedly made

[48] I note that Hernandez testified that he hired Marcia Cordero, and the Respondent repeats the assertion in its brief (R. Amend. Br. at 11 fn. 12), but I discredit the assertion and claim. Although all hiring records were subpoenaed, the Respondent did not produce an application, paycheck, or paystub evidencing Cordero's hire. In addition, neither the Respondent's payroll registers (GC Exhs. 43 and 44), employee roster report (GC Exh. 37) nor even Sheskier's personally annotated AffinEco GOP seniority list on which he kept track of the former AffinEco employees hired, reflects that Cordero was hired. Moreover, multiple witnesses were asked but no one saw Cordero working at the facility after November 4. She was not hired, and I so find.

statements admitting the Respondent's discriminatory animus as a motive for not hiring former AffinEco employees.

For instance, they told applicants that "the owner of the company doesn't want anyone with [a/the] Union," that they would "have to call Fareri to ask if they would hire us" because there was no longer a union at the GOP," that "by orders of Mr. Fareri he did not want any employee hired from those that had worked previously to the company nor anyone that belonged to 32BJ," that it was "an order of Mr. Fareri" for employee Indiana Pena to "[n]ever return again" because she had belonged to 32BJ, that they told employees that "[t]hey couldn't hire us because the new owner did not want anyone from 32BJ," that Hernandez and the Roldan brothers, "all said many times to all the employees they did not want to hire anyone who had worked for the company before nor anyone belong to 32BJ," before hiring Ana Elicea Hernandez asked her if she had a union---which she denied—and then later asked her "why she had lied about being in the Union," and asked her to go building to building identifying those she knew when she previously worked at the GOP, and at one point showed her a union flyer and asked if she knew any of the people in the photo.

In addition, the evidence is that Hernandez repeatedly asked employee-applicants if they were former AffinEco employees and/or union-represented. Thus, such questions were asked not only to the group of former AffinEco workers who unsuccessfully sought work the evening of November 7, but also to Elicea, who applied on November 8. Marcella Jaramillo also testified that when she applied for work at the GOP Hernandez asked her if she "had worked in the building before. And if I belonged to a union."

This is all independently unlawful, but also direct evidence of animus that supports the General Counsel's hiring discrimination case, as is the unlawful discharges of Pena, Maurad, and Bravo-Affon, discussed below, and the comments made to them during the discharges.[49]

These are admissions by the chief agents of the Respondent directly responsible onsite at the GOP for the hiring of cleaners. Obviously, these statements provide significant direct evidence of antiunion animus by the Respondent.[50]

[49]For example, Hernandez told Pena that she "was on a list of people not allowed to work in those buildings"; that she should "not to return to work for having worked at the previous company, for belonging to 32BJ and for being married to one of the [former AffinEco] managers"; that it was "an order of Mr. Fareri to return never again." Maurad and Bravo-Affon were told by Hernandez that "they had a list with the name of the people that are not allowed to work there and that obviously our names were listed there." Hernandez told them that there was "a lot of pressure coming from the new boss and they don't want any trouble.

[50]The expression of antiunion rationales for not hiring employees made by supervisors uninvolved in hiring have been found to "provide ample evidence of the Respondent's animus." *TCB Systems, Inc.*, 355 NLRB 883, 885 (2010). The seriousness with which employees took these messages provides further evidence that they occurred. Word spread. As far as the record demonstrates, every one of the former AffinEco employees hired—or who individually applied—hid the fact of their prior employment at GOP on their written applications, choosing not to include this information in the part of the application asking for prior employment. Absent discrimination, this would be relevant and even helpful information to include on an application, but the employees knew the deal. Bravo-Affon testified that when she went to pick up an application, she "saw some coworkers that I knew [from AffinEco], but they pretended not to know me."

Moreover, also notable is the inconsistent approach to hiring exhibited by the Respondent. Almost humorous—were the stakes not so serious—is Hernandez offering Union Representative Sargent (whom he did not know) a job based on a chance encounter with her on the road inside the GOP campus at approximately 5:30 p.m. the evening of November 7. However, just about half an hour later when a group of applicants identified by Roldan (and themselves) as former AffinEco employees showed up at Building 2 seeking work, suddenly, Hernandez decided that they were not hiring at the GOP, even while Hernandez admitted at trial that in fact, he did need to hire at that time. The next day, Hernandez and Roldan resumed hiring for applicants who appeared individually, although admittedly Hernandez hired no one he knew to be a former union-represented GOP employee. The inconsistency in this hiring is wholly unexplained by the Respondent—although that may be because the explanation is so obvious, and unlawful.[51]

The employees, many on their own, but also through their Union, went to great lengths to attempt to continue working at GOP under the Respondent and to convey their interest to the Respondent. Union Representative Sargent sent repeated letters—emailed, hand-delivered, and delivery service—that included "an unconditional request for application for employment" on behalf of the former employees, a petition signed by 13 of the employees seeking work, and the "GOP Seniority List." These letters went to John Fareri, and Kelly Pia, through email and through delivery to 2 Dearfield.

The Union's efforts proved futile and netted nothing. There was no response from anyone at the Respondent. Somehow—the Respondent does not explain how—Hernandez claims he heard nothing about this and received none of the correspondence, lists, or petitions. This is his claim, even though he worked closely in the first weeks with Kelly Pia, who was physically present at GOP, and who had a working email, and who reported to John Fareri. Pia did not testify, so we will never know if she would corroborate Hernandez' story, a suspicious omission in its own right. Fareri testified. He contradicted Hernandez, as did employees who credibly testified that Hernandez made reference to a "list" of employees he had who were not to be hired.[52]

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[51] I want to specifically reject the suggestion of the Respondent on brief (R. Amend. Br. at 9, 27), based on an exaggeration of the testimony from Hernandez that, in any event, I have specifically discredited, above, that Hernandez did not need additional employees on November 7 and did not know if he would need any. He was seeking to hire only *minutes* before the former AffinEco employees arrived in a group at the GOP, at which time he suddenly claimed he did not know if he needed employees. He admitted that as of November 5, he believed he needed 20 employees—which proved to be an underestimate—and he did not have even that many as of November 7. Moreover, Hernandez admitted that he needed employees at the very time that the group of employees approached him on November 7. (Tr. 798). He resumed hiring the next day when applicants whom he did not know (and who did not mention their affiliation with AffinEco) showed up individually.

[52] As discussed above, the November 8 petition was hand-delivered by Sargent and employees to Fareri Associates headquarters, where the petition and cover letter were handed to Cindy Jenereaux who was behind the front desk. At the outset of the trial (Tr. 9-11), the General Counsel's motion to orally amend the complaint to allege that Jenereaux is a statutory supervisor and statutory agent of the Respondent was granted. The Respondent denied the allegations (Id.). There is no serious question but that Jenereaux was a statutory agent of the Respondent for the purposes of receiving the letter and petition at the front desk. (Indeed, in its post-trial brief the Respondent does not bother to contest the matter.) Moreover, Fareri admitted that he "think[s] she brought it to me." That is her only relevance to this case. In any event, her status is clear.

Notably, the Board holds that a union official's letter making an unconditional application for employment on behalf of unit members is sufficient to put the successor on notice that the predecessor's employees wish to apply for employment. *Capital Cleaning Contractors*, 322 NLRB 801, 807 (1996) (citing *Harvard Industries*, 294 NLRB 1102, 1110 fn. 18 (1989) and *Weco Cleaning Specialists*, 308 NLRB 310, 318 fn. 15 (1992)), enforced, 147 F.3d 999 (D.C. Cir. 1998). An application process which is designed to frustrate attempts of union-represented employees to obtain jobs is evidence of union animus. *Capital Cleaning Contractors*, 322 NLRB at 807. That is what we have here in the Respondent's obdurate refusal to respond to the union's unconditional application, or to take any steps to act on this offer of labor—at a time when the Respondent needed cleaners.

Even assuming, arguendo, that the Respondent is the victim of the worst internal mail delivery and communication system in corporate history, and innocently misplaced all of the union's communications, many of the employees, at Sargent's urging, went to Building 2 at GOP on the night of November 7, and made a collective effort to be hired. As Roldan confirmed, the group announced "that they were Employees of the prior Company and that some of them had a lot of experience, experience going back years and that they knew the buildings there" and "were looking for work because they were unemployed." Thus, the Respondent's suggestion that it did not know the group were former employees is not true. This time, the Respondent—through Hernandez and Roldan—made its own list of employee applicants. However, none were called from the list. Why? The Respondent's story is that it lost the list. The fact that this Respondent repeatedly loses track of any paper with the former employees' information makes it all the more unlikely. In addition, the fact that Roldan and Hernandez told contradictory stories about what happened to the list, where it was kept, and when it was lost, makes it easy to conclude that the Respondent's story is bogus. Hence, this false pretextual claim provides additional inferential evidence of unlawful motivation, as the failure to "substantiate [an] asserted rationale for not hiring [alleged discriminatees], coupled with evidence undercutting th[e] rationale," will support a finding of unlawful motivation. *TCB Systems, Inc.*, 355 NLRB 883, 885 (2010).

Finally, it is important to point out that the evidence supports the conclusion that the Respondent's discriminatory hiring scheme was in place from the first day of hiring, November 5.

On November 5, the Respondent knew that the Affineco employees were available, trained, and experienced in the GOP buildings. The Affineco employees provided everything that

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Jenereaux reports to John Fareri and to Sheskier. Sheskier testified that Jenereaux has the power to act on GPS's behalf with regard to some of her duties. Sheskier testified that there is no dedicated receptionist at the Fareri Associates headquarters, but anyone there might receive a package. Sheskier agreed that if something comes in with the name of Fareri Associates it's known within the office to give it to the people who are in charge of the GOP operations. Even without these facts, Jenereaux's acceptance of a document from behind the company's front desk is likely to prove agency status. With them, it is an unassailable conclusion. See, e.g., *Waterbed World*, 286 NLRB 425, 426–427 (1987) ("test for determining an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was . . . acting for management") (internal quotations and citations omitted). In addition, based on Sheskier and Fareri's testimony, and Jenereaux's failure to testify, I believe and I find that she delivered the petition and cover letter to Fareri. In any event, Fareri admitted seeing the letter attachments on November 7 or 8, and testified that he gave the list of former employees to Hernandez, "probably" within days, although he also testified that "I'm not sure how it would have gotten to him, but it must have gotten to him."

the Respondent needed, and the Respondent had no workforce to clean. But instead of the former AffinEco cleaners, the Respondent chose to hire any body it could round up—friends of friends with no experience—and even then it had so few that marathon work sessions were required that weekend.

The other thing the Respondent knew very well about the AffinEco workers was that they were union-represented. And Sheskier and/or Fareri did not want to be "stuck with the Union." The Respondent offers zero explanation for not utilizing this obvious solution to its November 5 staffing problem. The fact that the Respondent did not look to the experienced, out-of-work, but unionized AffinEco employees on November 5 is by itself some evidence of discriminatory motive. *Daka, Inc.*, 310 NLRB 201, 208 (1993) (even in absence of evidence of overt animus, violation found where new employer overlooked former employees who "provided a willing and available source of manpower, which could serve Respondent's immediate need for qualified employees with little adjustment and training") (internal quotations, citations and bracketing omitted); *NLRB v. Foodway of El Paso*, 496 F.2d 117 (5th Cir. 1974) ("Despite the presence of a pool of experienced workers, respondent went to considerable length to replace the union employees with entirely new workers—most of whom had no previous experience on pipeline operations") (quoting, *NLRB v. New England Tank Industries*, 302 F.2d 273, 276-277 (1st Cir. 1962)); *Systems Management*, 292 NLRB 1075, 1097(1989) (Respondent correctly argues that an employer is not necessarily obliged to seek out the predecessor employees. In this context, however, Respondent in urgent need sought out new employees by way of a blind advertisement, which necessarily gives rise to an inference that Respondent sought to avoid the risk of possible predecessor employee applications . . . . Under the facts of this case, it was incumbent on Respondent to come forth with some cogent explanation as to why it did not consider or actively seek out the predecessor downtown employees as it had actively sought out totally new employees").

Obviously, Sheskier's stated preference for incumbent contractors ("we like to give contractors who are on a job, you know, preference") did not extend to the contractor's unionized employees.

But the evidence is stronger than just the fact that the Respondent so obviously ignored the available pool of experienced—but union-represented—employees.

We know—from direct admissions—that two days later the plan to not hire former AffinEco employees was in effect, the evidence of which was communicated directly to the former AffinEco employees who collectively approached the GOP seeking work the evening of Monday, November 7. We further know from Sheskier that as of November 5, the Fareri companies already had in their possession a detailed seniority list for the GOP employees that included phone numbers and home addresses for 20 of the 21 employees. We know that less than two weeks before November 5, Sheskier and/or John Fareri are asking in frustration, "Are we stuck with the Union? Are we stuck with the Union?" when confronted with the realities of the union contract. They were told "that's something you need to seek legal counsel for," and then promptly sought counsel, contacting and meeting with labor and employment counsel for undisclosed reasons.

When Sheskier called AffinEco on November 4 and told its president Senecal that "your people should not show up tonight," the decision not to use these employees had been made. And although it is hearsay, AffinEco employees were directly told by their managers on the night of November 4, that the new owner, identified as John Fareri, "did not want the employees who had been with the previous company or the Union." They were told that the new employer "did

not want us or the company in that building anymore." This November 4 hearsay evidence is not nothing. It proved to be true, corroborative of what the employees soon learned directly from the mouths of Hernandez and Roldan—that the Respondent was intent on discriminating against the AffinEco employees. It would border on the preposterous to conclude that mere guessing or perhaps a premonition prompted AffinEco managers to tell employees on November 4, that Fareri did not want to hire employees who had been with the former employer or the union. No. The unlawful hiring scheme was in effect from the first day of hiring, on November 5.[53]

For all of the above reasons, the General Counsel's *Wright Line* burden has been amply and strongly met. In the face of the General Counsel's showing of unlawful motivation for the failure to hire the majority of the former AffinEco employees, the burden shifts to the employer to demonstrate that it would not have hired the predecessor's employees even in the absence of its unlawful motive. And given the General Counsel's strong showing of unlawful motivation, "the Respondent's rebuttal burden under *Wright Line* . . . is substantial." *A.S.V. Inc. a/k/a Terex*, 366 NLRB No. 162, slip op. at 1 fn. 4 (2018); *Vemco, Inc.*, 304 NLRB 911, 912 (1991).

The burden is not and cannot be met by the Respondent.

The Respondent does not dispute that the former AffinEco cleaners were experienced and familiar with the buildings and tenants. It does not claim that they were rejected for personal nondiscriminatory reasons. Rather, the essential claim by the Respondent is that it hired nondiscriminatorily and it was just happenstance that more of the former Affineco employees were not hired. This will not work.

For one, the Respondent offers no credible explanation at all for its indifference and willingness to ignore on November 5, the experienced AffinEco workers who it knew had just lost their jobs on the evening of November 4. The Respondent is simply silent as to how or why the Union's repeated faxes, emails, letters, and petitions seeking employment for the former AffinEco employees were never acted on by the Respondent even though it was desperate to hire at the time the Union's correspondence came to it. The Respondent offers no explanation for why it was offering work at 5:30 p.m. November 7, to someone it did not know to be affiliated with the Union, but not hiring thirty minutes later when a group of AffinEco union-represented employees collectively appeared at the GOP seeking work, but then the next day began again hiring individuals that it did not know to be former AffinEco employees.

The lack of any explanation for this highly suspicious behavior undermines the Respondent's claims of indifference as to whether the employees it hired had previously been union-represented or not.

[53]Hearsay may be used as corroborative evidence. *RJR Communications, Inc.*, 248 NLRB 920, 921 (1980) ("Courts have long recognized that hearsay evidence is admissible before administrative agencies, if rationally probative in force and if corroborated by something more than the slightest amount of other evidence. The Board jealously guards its discretion to rely on hearsay testimony in the proper circumstance") (citations omitted); *Dauman Pallet, Inc.*, 314 NLRB 185, 186 (1994). See also, *A.S.V. Inc.*, 366 NLRB No. 162, slip op. at 1 fn. 4 (2018) (finding hearsay report admissible under FRE 807 residual exception to the hearsay rule and that it strengthens finding of discrimination). In this case, the hearsay evidence culled from AffinEco managers that the Fareri companies intended to discriminate against the former AffinEco employees is "rationally probative in force" and strongly corroborated by other evidence.

The Respondent's chief argument is simply a waste of ink. Referenced throughout the trial, and extensively argued on brief, but utterly beside the point, is its claim that it refused to renew AffinEco's contract purely because of price considerations and not out of antiunion animus. In this regard the Respondent assiduously and emphatically mounts a defense to a claim that no one is making. Nondiscriminatory rationales for not renewing the AffinEco contract are no defense at all for a failure to hire employees because their hiring—or more specifically, the hiring of too many of them—would trigger union representation and bargaining rights. The Respondent's fervent contention that it's nonrenewal of the AffinEco contract was legitimate is no defense at all to the allegations in this case.

The Respondent's other chief defense is its suggestion that, because it ultimately hired approximately eight former AffinEco employees, it is not guilty of hiring discrimination. While a defense that claims "we didn't discriminate against every employee so we could not have discriminated against any one" is never a compelling defense,[54] it is particularly inapposite here.

For one, the Board has repeatedly recognized, a successor can meet its unlawful objective by hiring some of the predecessor's employees, but stopping short of allowing those employees to constitute a majority of the new work force.[55] Thus, in the successorship situation, the hiring of some but not other employees is no rebuttal to proven evidence of hiring discrimination.

Second, the premise is flawed. As discussed above, the evidence demonstrates that the Respondent's hiring discrimination began on November 5, when it ignored the experienced and displaced AffinEco employees in favor of inexperienced friends of friends, and various people hired sight unseen to begin cleaning of the GOP. Thus, even the former AffinEco employees who were hired were the victims of hiring discrimination until hired.

Essentially, the Respondent has no rebuttal to the General Counsel's case. Its denials of its overt discriminatory statements and conduct have been discredited. Its attacks on the

[54] *J.S. Alberici Construction Co.*, 231 NLRB 1038, 1041 fn. 5 (1977) ("Respondent argues that it could not have refused to hire McQuerry because of his union beliefs because it has hired many other strong union adherents. However, it is well settled that a Respondent's failure to commit unlawful discrimination in some instances does not establish that it will not act unlawfully in others"); *Graphic Communications Local 1-M (Bang Printing)*, 337 NLRB 662, 675 (2002) ("unlawful motivation is not somehow disproved by the fact that a respondent did not retaliate against each and every employee engaged in statutorily protected activities"), See e.g. *H.B. Zachry Co.*, 332 NLRB 1178, 1183 (2000) ("an employer's failure to discriminate against all applicants in a specific category is not decisive in cases involving refusal-to-hire allegations").

[55] *MSK Cargo/King Express*, 348 NLRB 1096 (2006) (finding discriminatory hiring where successor employer refused to hire 9 of the predecessor's employees in order to avoid a successor collective-bargaining obligation, even though the successor employer included 8 of the predecessor's employees among the 21 employees it hired); *Daufuskie Island Club & Resort*, 328 NLRB 415 (1999), enfd. 221 F.3d 196 (D.C. Cir. 2000), (finding that employer who had purposely hired 48.5 percent of the predecessor's employees had violated the Act).

credibility of the witnesses against it are without force and have been rejected. It simply ignores the weighty circumstantial of indirect evidence that is so compelling in this case.[56]

Notably, the Respondent has failed to provide any evidence that even a single former AffinEco cleaner would not have been offered or would have failed to accept employment with the Respondent at GOP absent the proven discrimination. As the Court of Appeals explained, enforcing *Systems Management*, supra, in relevant part,

> in order for [the respondent] to sustain its defense that no anti-union animus existed, it had to prove that no Local 29 employees would have accepted employment had employment been offered. This [it] failed to do. . . . [I]t is clear that to the extent that Systems argues that the burden of proof was on the Board to establish that the Local 29 employees would have taken the jobs with Systems had they been offered, that argument also fails. It is precisely because Systems did not comply with the notice and good faith bargaining requirements of the Act that the Board was prevented from ascertaining whether in fact the Local 29 workers would have taken the jobs offered by Systems at the part-time hours and wages.

Systems Management, Inc. v. NLRB, 901 F.2d 297, 306 (3d Cir. 1990).

In the face of the General Counsel's showing of antiunion animus, this burden falls to the Respondent as to each former AffinEco employee as part of a *Wright Line* defense.[57] This burden has not been seriously mounted, much less met.

Finally, I note that in reaching my conclusions regarding hiring discrimination, I do not rely on the General Counsel's contentions or arguments that Sheskier's annotation to a union seniority list to create a document tracking the hiring, termination, and "still employed" status of former AffinEco employees by the Respondent (GC Exh. 39) shows animus. I admit, it is hard to know

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[56]The Respondent (R. Amend. Br. at 7-8) cites Hernandez' testimony that neither John Fareri, nor Pia ever gave him any instructions about who to hire or who not to hire. But Hernandez was not a creditable witness. Moreover, Pia did not testify. I note that Hernandez testified that Pia, Sheskier, and Fareri, did not give him hiring instructions but stopped short of claiming *no one* told him to avoid hiring union-represented former AffinEco workers. While there is no direct evidence in the record as to who gave that order, there are a number of possible candidates. In any event, proof of who gave him that order is unnecessary. As discussed, the evidence is compelling that the Respondent discriminated in its hiring.

[57]*Capital Cleaning Contractors*, 322 NLRB 801, 808 (1996) (including 17 of 19 predecessor employees in order finding violation, excluding only 2 employees that testified that that successor's low wages or lack of benefits was only reason they did not apply with successor), enfd. in relevant part, 147 F.3d 999, 1007 (C.A.D.C., 1998); *Daufuskie Island Club and Resort, Inc.*, 328 NLRB 415, 415 fn. 3 (1999) (the Respondent deliberately refused to hire a certain percentage of the [predecessor's] employees in order to avoid the Union and th[us] all 108 discriminatees are entitled to reinstatement as set forth below"), enfd. 221 F.3d 196 (DC Cir. 2000). See also, *Smith and Johnson Construction Company*, 324 NLRB 970, 986 (1997) ("the Company failed to present evidence to demonstrate that any of the predecessor employees were not hired for lawful reasons"); *Systems Management, Inc.*, 292 NLRB 1075, 1096 (1989) ("with respect to any uncertainty that might arise about whether predecessor employees would have applied for and would have accepted employment . . . Board precedent . . . holds that such uncertainties will be resolved against the wrongdoer whose conduct created those uncertainties).

what to make of this admitted tracking of hires/discharges/still working among the former AffinEco workforce. Sheskier essentially admits he was engaged in this tracking after returning from a vacation on November 21. Sheskier testified that he created and relied upon this document after the Union's unfair labor practice charges were filed as a way to assess and respond to the union's claims that former employees were being discriminated against. I draw no conclusion as to the truth of Sheskier's claim, but there is no evidence that Sheskier's annotations to the seniority list were made before the filing of the Union's unfair labor practice. I do not find convincing the General Counsel's contentions that Sheskier's testimony or his pretrial affidavit contain any evidence that undermine Sheskier's assertion about his use of the document. I do not exonerate the Respondent in this regard, but I do not rely on this document or the testimony about it in reaching the conclusion that the Respondent violated the Act in its hiring (and firing) of former AffinEco employees.[58]

The discharges

The General Counsel and the Union allege that the discharges of Pena, Maurad, and Bravo-Affon, were unlawfully motivated in violation of Section 8(a)(3) and (1) of the Act.

As referenced above, the Supreme Court-approved analysis in cases turning on employer motivation, including allegedly unlawful discharges, was established in *Wright Line*, supra.

In *Wright Line*, the Board determined that the General Counsel carries his burden by persuading by a preponderance of the evidence that employee protected conduct was a substantial or motivating factor (in whole or in part) for the employer's adverse employment action.

Under the *Wright Line* standards, this burden is typically met in discharge cases by showing the employee engaged in protected activity, employer knowledge of that activity, and animus on the part of the employer towards protected activity. *Cayuga Medical Center*, 366 NLRB No. 170, slip op. 1 fn. 1 & slip op. at 30 (2017); *Dish Network*, 363 NLRB No. 141, slip op. at 1 fn. 1 (2016).

Such showing proves a violation of the Act subject to the following affirmative defense: the employer, even if it fails to meet or neutralize the General Counsel's showing of unlawful motivation, can avoid the finding that it violated the Act by "demonstrat[ing] that the same action would have taken place in the absence of the protected conduct." *Wright Line*, supra at 1089.

Here, as found above, Pena was told on November 14, by Hernandez that "I was on a list of people not allowed to work in those buildings." Pena objected, telling him that "it wasn't important to be on the list; the only thing that was important to me was work, to be able to work." She finished her work for that evening. However, the next day, November 15, Hernandez called her again and told Pena "not to return to work for having worked at the previous company, for belonging to 32BJ and for being married to one of the [former AffinEco] managers." Hernandez told Pena "[t]hat was an order of Mr. Fareri to return never again."

[58]I note that the Sheskier's document indicates that Rosa Vasquez was hired the week ending November 13, and terminated the week ending November 20. I believe, and find, this was an error. There is no testimony or documentary evidence that Vasquez was hired by the Respondent. It is likely that Sheskier's notation referred to Indiana Pena, whose name is absent from Sheskier's seniority list but who, in fact was hired during the week ending November 13 and terminated during the week ending November 20.

These admissions make the General Counsel's case that Pena was discharged for her affiliation with the Union. In addition, the record is replete with findings of animus and concerns expressed by Hernandez about hiring former AffinEco employees. The Respondent's rebuttal consists only of the discredited claim of Hernandez—contradicted by Roldan, and credibly disputed by Pena—that Pena was not discharged but simply stopped showing up for work. I find the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Pena because of her union affiliation.

As to Maurad and Bravo-Affon, as discussed above, the credited evidence is that Hernandez and Roldan met with them after they arrived at work on November 30, and that in the meeting Hernandez asked if they had worked for the previous company. They told him yes, and Hernandez told them, "they had a list with the name of the people that are not allowed to work there and that obviously our names were listed there." Hernandez told them that "they are new and they have a lot of pressure coming from the new boss and they don't want any trouble." Thus, by Hernandez's admission, one of the motivating reasons for Maurad and Bravo-Affon's discharge was his "list with the name of the people that are not allowed to work there," a comment that followed Hernandez asking them if they had worked there in the past. They had, so, as Hernandez told them, "obviously" their names were on the list of people not allowed to work there. This conversation—set as it is in the context of the overall record of this case—leaves no reasonable doubt as to the problem with having worked at GOP in the past. Absent discrimination, past experience in the GOP would be a plus. However, the record is replete with statements that the union status of the former employees at GOP was the problem.

To this direct evidence of discriminatory motive for the discharge, one must add the many discriminatory inferences suggested by the record.

To begin with, as detailed above in consideration of their relative credibility, Hernandez charged Bravo-Affon with—and claimed to base his discharge of her on—setting off alarms. Hernandez, who lacked credibility on so many points, lacks credibility here. I find, as Bravo-Affon testified, that he had never before talked to or warned her about tenant complaints for the setting off of alarms, a matter for which there was zero corroboration offered. The only corroborating tenant email complaining of alarms going off cites seven instances, six of which occurred when Bravo-Affon was not at work. Five precede her hire date. It is unbelievable that the only employee discharged for alarms going off in building 5 is the one for whom there is no documentation, even while Hernandez admitted that most of the tenant complaints came into Pia by email. Further, Hernandez admitted at trial that the person or persons responsible for the alarms going off that were cited in the memo was not Bravo-Affon, and he further admitted that the persons responsible were not fired but transferred to other buildings.

The Respondent offers no explanation of why the employees guilty of the offense for which Bravo-Affon was charged by Hernandez were not terminated, but simply transferred to a different building. This would be disparate treatment, even if we could indulge the unsupported accusation that Bravo-Affon was also responsible for setting off alarms. In any event, the point is that unexplained disparate treatment further supports an inference of animus and discriminatory motive for the adverse action taken against Bravo-Affon. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011). See *Medic One, Inc.*, 331 NLRB 464, 475 (2000).[59]

[59]On brief, the Respondent claims (R. Amend. Br. at 34) that several other employees were terminated with no suggestion that their union status played any role. In fact, Hernandez admitted that no one else was terminated for the reasons that Bravo-Affon and Maurad were terminated. All the other terminated employees were fired for failing to show up for work, with the exception of

Moreover, while in his sworn pretrial affidavit Hernandez blamed Bravo-Affon for tenant complaints based on "performance issues like not cleaning the toilets properly, not vacuuming the floors properly," this appeared to be dropped at trial. He no longer claimed (as he had in his affidavit), that these were problems that he had spoken to Bravo-Affon about. In his affidavit, Hernandez cited these tenant complaints—specifically mentioning the complaints about the toilets not being cleaned—as a matter he raised with her in her discharge meeting. These performance-based complaints against Bravo-Affon were also cited by the Respondent's counsel (GC Exh. 54 at page 4 fn. 4) in its position statement. However, this explanation for the discharge was dropped at trial, and Hernandez testified that the only issue with Bravo-Affon was that she set off alarms.

As to Maurad, the shifting rationales provided by Hernandez for her termination are even more notable. At trial he claimed that one of the offenses that led to her discharge was the failure to collect and throw out garbage. But that explanation is missing from his pretrial affidavit provided nearly one year before trial. In his affidavit he claims that the performance issues involved, in addition to throwing out documents that should not have been thrown out, "she was setting off alarms." Indeed, in his affidavit, Hernandez stated that "[mo]st of the complaints about Building 9 were about setting the alarm system off." Hernandez asserted in his affidavit that he "traced the complaints back to . . . Maurad." This defense appears to have been dropped at trial. Roldan too, did not know of any such charges having been made against Maurad and does not recall it being mentioned in her termination meeting. The attribution at trial of new offenses against Maurad and the omission of the primary one against her advanced in the sworn pretrial statement does not enhance the Respondent's position, but buttresses the General Counsels. See *Approved Electric Corp.*, 356 NLRB 238 (2010) ("The Board commonly recognizes such shifting rationales as evidence that an employer's proffered reasons for discharging an employee are pretextual"); *City Stationery, Inc.*, 340 NLRB 523, 524 (2003); *Jacee Electric. Co.*, 335 NLRB 568 (2001) ("the Respondent's varying rationales for its conduct lead to the inference that the real reason for the layoff is not among those asserted by the Respondent"); enfd. 56 Fed. Appx. 102 (3d Cir. 2003); *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) ("Where . . . an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive."); *Sound One Corp.*, 317 NLRB 854, 858 (1995).

All of this proves a violation and the burden shifts to the Respondent to prove that it would have taken the same adverse action against Maurad and Bravo-Affon even in the absence of their prior union activity (or affiliation).

The Respondent' defense fails completely. The foregoing evidence in support of the General Counsel's case also demonstrates the false and pretextual nature of the Respondent's claims about why it discharged Maurad and Bravo-Affon. This not only adds weight to the General Counsel's case also pretermits the *Wright Line* inquiry and makes it impossible for the Respondent to rebut the General Counsel's case because, where, as here, "the evidence establishes that the proffered reasons for the employer's action are pretextual--i.e., either false or

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one, Luis Tintayo Gomez who was terminated at some unknown date for "poor performance" and his efforts to act like a supervisor among the other employees when he was not, an overstepping that led other employees to complain about him. The fact is, the discharges of Maurad and Bravo-Affon were unique. Others charged with such misconduct were transferred but never terminated, not to mention that the charges against Maurad and Bravo-Affon were suspect.

not actually relied upon--the employer fails by definition to show that it would have taken the same action for those reasons, regardless of the protected conduct."[60]

For all of the above reasons, I find that, as alleged, Pena, Maurad, and Bravo-Affon were terminated in violation of Section 8(a)(3) and (1) of the Act.

8(a)(5) violations

Successorship and the duty to bargain

The Board's successorship doctrine is "founded on the premise that, where a bargaining representative has been selected by employees, a continuing obligation to deal with that representative is not subject to defeasance solely on grounds that ownership of the employing entity has changed." *Hudson River Aggregates, Inc.*, 246 NLRB 192, 197 (1979), enfd. 639 F.2d 865 (2d Cir. 1981), citing *NLRB v. Burns Security Services*, 406 U.S. 272, 279 (1972). In *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), the Supreme Court agreed with the Board that a union's presumption of majority support "continues despite the change in employers. And the new employer has an obligation to bargain with that union so long as the new employer is in fact a successor of the old employer and the majority of its employees were employed by its predecessor." 482 U.S. at 41.

Here, to begin with, and although disputed by the Respondent—as it disputes nearly everything in this case, without reference to the reality staring back at it from the record—the Respondent is obviously a successor employer to AffinEco. There is, without question, substantial continuity between the AffinEco cleaning enterprise at GOP and the Respondent's cleaning enterprise at GOP. *Fall River Dyeing Corp.*, 482 U.S. 27, 43 (1987) ("the focus is on whether there is a 'substantial continuity' between the enterprises"). This question is analyzed primarily from the "employees' perspective." Id. Here, the employing industry is the same: cleaning the commercial buildings. The employees utilize the same skills, using the same methods, work from the same physical workplace, cleaning for the same customers (i.e., the buildings' tenants). The unit work of the employees has not changed in any significant way—the AffinEco cleaners cleaned GOP and after the transition, the Respondent's cleaners cleaned the GOP. There was no hiatus in the cleaning work.

The biggest change is that only some of the AffinEco employees worked part-time, while nearly all of the Respondent's cleaners work part-time. This will not defeat a finding of successorship. *Systems Management v. NLRB*, 901 F.2d 297, 304-305 (3d Cir. 1990) (change from full-time to part-time janitor positions does not show lack of continuity affecting successorship determination), enf'ing in relevant part, 292 NLRB 1075 (1989).

Nor does the Respondent's other argument have merit—the fact that cleaning was only a small part of the Respondent's total operations, whereas AffinEco was in the cleaning business. In considering substantial continuity, "[t]he employing enterprises are not the overall companies involved, but the . . . facilities whose employees were taken over by Respondent." *Southern Power Co.*, 353 NLRB 1085 (2009), adopted, 356 NLRB 201 (2010), enfd. 664 F.3d 946 (D.C.

[60] *David Saxe Productions*, 364 NLRB No. 100, slip op. at 4 (2016); *Rood Trucking*, 342 NLRB at 898, quoting *Golden State Foods*, 340 NLRB 382, 385 (2003); *Frank Black Mechanical Services*, 271 NLRB 1302, 1302 fn. 2 (1984) (noting that "a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel").

Cir. 2012). "Continuity of the employing industry requires consideration of the work done." *Saks Fifth Avenue*, 247 NLRB 1047, 1050-1051 (1980). See, *Ford Motor Co.*, 367 NLRB No. 8, slip op. at 9 (2018) (worldwide auto manufacturer that took over maintenance of testing facility from maintenance contractor was successor to maintenance contractor). As long as the former AffinEco GOP cleaning unit remained an appropriate unit—and even the Respondent does not challenge that—then the differences in the overall enterprises make no difference. Viewed, as the situation must be, from the employee cleaners' perspective, the substantial continuity of the employing enterprise is clear.[61]

Thus, I find that the Respondent was the successor employer to AffinEco when it assumed the cleaning operations at GOP.[62]

The General Counsel alleges that the Respondent's duty to recognize and bargain with the Union remained intact after the changeover and that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union.[63]

In the absence of unfair labor practices, a successor's duty to bargain with the employees' union chiefly turns on whether a majority of the employees it hires were employed by the predecessor employer. *Vermont Foundry*, 292 NLRB 1003, 1009 (1989). However, "[i]t is well established that when a new employer would have hired a majority of its unit employees from the predecessor's unionized work force but for the new employer's discrimination based on antiunion animus, the Board will deem the new employer a successor with an obligation to recognize and bargain with the union that represented the predecessor's unit employees. *Ridgewood Health Care Center, Inc.*, 367 NLRB No. 110, slip op. at 3 (2019).

Moreover, "when a successor refuses to hire predecessor employees because of antiunion animus, the Board presumes that but for such discrimination, the successor would have hired a majority of incumbent employees." *Ridgewood Health Care Center*, supra, quoting *NLRB v. CNN America, Inc.*, 865 F.3d 740, 752 (D.C. Cir. 2017) (internal quotations omitted).

Finally, of great significance here, where the successor employer has discriminated in hiring against the predecessor's employees, the Board will infer that substantially all the former employees would have been retained absent the unlawful discrimination, with any uncertainties in this regard resolved against the wrongdoer. *E.S. Sutton Realty Co.*, 336 NLRB 405, 408 (2001) ("Because Sutton discriminatorily refused to hire the incumbents, it is presumed that substantially

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[61]A party challenging a historical unit bears the burden of showing the unit is no longer appropriate (*Cadillac Asphalt Paving Co.*, 349 NLRB 6, 9 (2007), and the Respondent does not even try. I find the unit is appropriate, particularly given the Board's longstanding policy that a "mere change in ownership should not uproot bargaining units that have enjoyed a history of collective bargaining unless the units no longer conform reasonably well to other standards of appropriateness." *Cadillac Asphalt Paving Co.*, 349 NLRB at 9.

[62]I note that I use the term "successor" the way it is used by the Supreme Court in *Fall River*, supra—as a finding that the new employer has substantial continuity with the old employer. The question of the successor's duty to bargain is a separate question that turns on the composition of the new employer's workforce (or, as here, on the successor's discriminatory hiring practices).

[63]An employer's violation of Sec. 8(a)(5) of the Act is also a derivative violation of Sec. 8(a)(1) of the Act. *ABF Freight System*, 325 NLRB 546 fn. 3 (1998); *Tennessee Coach Co.*, 115 NLRB 677, 679 (1956), enfd. 237 F.2d 907 (6th Cir. 1956).

all of them would have been retained"); *Capital Cleaning Contractors*, 322 NLRB 801, 808 (1996), enfd. in relevant part, 147 F.3d 999, 1007 (D.C. Cir. 1998); *Daufuskie Island Club and Resort, Inc.*, 328 NLRB 415, 415 fn. 3 & 422 (1999) ("If a successor employer unlawfully refuses to hire predecessor employees, there is a presumption that the union's status as the majority representative of the employees would have continued"), enfd. 221 F.3d 196 (D.C. Cir. 2000); *Smith and Johnson Construction Company*, 324 NLRB 970, 986 (1997); *American Press*, 280 NLRB 937, 938 (1986). Thus, in successorship cases involving hiring discrimination, the union's presumption of majority support and the employer's duty to bargain remain intact. *Love's Barbeque Restaurant*, 245 NLRB 78, 82 (1979), enforced in relevant 640 F.2d 1094 (9th Cir.1981); *Shortway Suburban Lines, Inc.*, 286 NLRB 323, 328 (1987), enfd. 862 F.2d 309 (1988); *Systems Management, Inc. v. NLRB*, 901 F.2d 297, 302-303 (3d Cir. 1990) (and cases cited therein at fn. 7), *enforcing Systems Management, Inc.*, 292 NLRB 1075, 1095–1096 (1989).

Here, as found, the Respondent unlawfully refused to ever hire 13 of the former AffinEco cleaners. Combined with the eight former employees who it has been found to have discriminatorily delayed hiring, the predecessor's employees would have easily constituted a majority, even of the full complement of 33 or 34. Accordingly, the Union retained its presumption of majority support and the duty to bargain remained intact.

The Respondent has not and cannot offer any evidence to suggest that absent the discrimination it would not have hired all of the discriminatees. Although the presumption that, absent discrimination, the majority of the successor's workforce would have been composed of the predecessor's employees is one of law, I agree with the General Counsel that the facts of this case only strengthen that presumption here. The Respondent was desperate for employees, and it had available to it an experienced and trained workforce completely familiar with the GOP facility. It took the Respondent a couple of weeks to reach its full complement—but absent discrimination it could have offered employment to the 21 former AffinEco employees from day one. It seems particularly likely that, absent an intent to discriminate, it would have.

Thus, the union's presumption of majority support and the Respondent's duty to bargain as a successor remained in effect after the Respondent's takeover of the cleaning at GOP.[64]

Unilateral establishment of initial terms and conditions

The General Counsel and Union allege that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the pay, benefits, hours of work, and other terms and conditions of employment for the unit employees from that which prevailed under AffinEco.

Here, when the Respondent took over the cleaning it instituted changes immediately, applying a $10 an hour wage rate—a significant cut from the terms and conditions enjoyed by GOP cleaners under the status quo ante. The Respondent stopped contributions to numerous health and welfare, pension, and other union funds on behalf of cleaning employees, each of which were a significant part of the employees' terms and conditions under AffinEco. These unilaterally imposed changes in terms and conditions departed widely from the terms and

[64]I note that under the circumstance, no independent request to bargain by the Union was necessary. *Planned Building Services,* 347 NLRB at 718 ("Where, as here, [the employer] has discriminatorily refused to hire most of the employees employed by the predecessor employer's at each building, any request for bargaining would be futile"); *Eastern Essential Services*, 363 NLRB No. 176, slip op. at 17 (2016); *Smith & Johnson Construction*, 324 NLRB 970, 970 (1997), *Triple A Services*, 321 NLRB 873, 877 fn. 7 (1996); *Precision Industries*, 320 NLRB 661, 711 (1996).

conditions set forth in the 2016 Hudson Valley and Fairfield County Contractors Agreement, which was the agreement governing the terms and conditions of employment for the AffinEco cleaners at GOP.

A statutory successor is ordinarily free to set initial terms and conditions of employment. *Burns*, 472 U.S. at 284. However, that right is forfeited where "the successor's widespread discriminatory hiring practices ma[k]e it impossible to determine whether it would have hired all or substantially all of the predecessor unit employees absent the hiring discrimination." *Ridgewood Health Care Center*, supra, slip op. at 6, summarizing *Love's Barbeque* Restaurant No. 62, 245 NLRB 78, 82 (1979), enfd. in part sub nom. *Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981), See also *Advanced Stretchforming International*, 323 NLRB 529, 530-531 (1997), enfd. in relevant part 233 F.3d 1176 (9th Cir. 2000); *Daufuskie Island Club and Resort*, 328 NLRB at 422.

"Here, any uncertainty as to what Respondent would have done absent its unlawful purpose must be resolved against Respondent, since it cannot be permitted to benefit from its unlawful conduct." *Love's Barbeque*, 245 NLRB at 82.

The Respondent has been found to have discriminated in hiring against every one of the predecessor's employees. Furthermore, it hired a significantly larger complement of employees (but not twice as many) as were employed by the predecessor. Thus, in this case there is a likelihood—not mere "uncertainty"— that absent discrimination, the successor would have hired every one of the predecessor's unit employees. The Respondent has no evidence to overcome the resolution against it of any uncertainty as to this question of what it would have done absent its unlawful discrimination. Accordingly, as recently reaffirmed in *Ridgewood Health Care Center*, supra, the *Loves' Barbeque* remedy of requiring the Respondent to bargain with the union before setting initial terms and conditions of employment is applicable. In such cases the unilateral establishment of new terms and conditions of employment by the Respondent violate Section 8(a)(5) and (1).[65]

Avoiding the costs associated with the union contract was the explanation for the Respondent's refusal to renew the AffinEco contract. In that regard, it is not surprising that the Respondent wanted to act unilaterally to change the terms and conditions. But the Respondent has no one to blame for its predicament but itself. Had it eschewed its discriminatory hiring plan and instead "clearly announced its intent to establish a new set of conditions prior to inviting former employees to accept employment" (*Spruce Up Corp.*, 209 NLRB 194, 195 (1974), enfd. 529 516 (4th Cir. 1975)), it then would have been free to hire employees—in a nondiscriminatory fashion—into a new set of terms and conditions of employment. But the Respondent sought not

[65]In *Ridgewood Health Care*, supra, at slip op. 6–9, the Board rejected application of the *Love's Barbeque* remedy in circumstances where, even with the ambiguity created by the successor's unlawful hiring practices, the factual record precluded a finding that the successor would have hired all or substantially all of the predecessor unit employees. As discussed in *Ridgewood Health Care*, the Board found that such a finding is precluded where the successor employs a smaller complement of unit employees and thus the new unit could not hire all (or substantially all) of the predecessor unit employees. However, that is *not* the case here, where the Respondent successor's unit is *larger* than the predecessor's unit and, absent the Respondent's hiring discrimination could have—indeed, as discussed above there are reasons to believe that it would have—hired all of the predecessor's unit employees. In the circumstances here, where the finding that the Respondent would have retained all of the predecessor's employees is implied in law, the Board in *Ridgewood* reaffirmed the appropriateness of the *Love's Barbeque* remedy. See, *Ridgewood*, supra, slip op. at 6.

just to avoid the AffinEco-Union labor agreement, but also engaged in a scheme of discriminatory hiring in an effort to avoid a bargaining obligation. The end result of its unlawful gambit is that it discriminated against all the employees, in a situation where it was otherwise likely to hire all of the former employees (and cannot show otherwise) and therefore must instate and reinstate the employees against whom it discriminated, recognize and bargain with the Union, and restore and abide by the old terms and conditions of employment until it bargains to impasse or agreement.

Unilateral contracting out of unit cleaning work

The General Counsel and Union allege that the Respondent violated Section 8(a)(5) and (1) of the Act when it terminated its cleaning services at GOP on or about July 1, 2017, and subcontracted the work to IBM.

It is axiomatic that the substitution of the unit employees by contracting out their work is a mandatory subject of bargaining. *Spurlino Materials, Inc.*, 353 NLRB 1198, 1218 (2009) ("Subcontracting of bargaining unit work that does not constitute a change in the scope, nature, or direction of the enterprise but only substitution of one group of workers for another to perform the same work is clearly a mandatory subject of bargaining"), adopted 355 NLRB 409 (2010). See, *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 211 (1964) ("To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace").

Here, there is no dispute. The Respondent admits that unilaterally, without notice to or consultation with the Union, it contracted out the cleaning work at GOP beginning July 1, 2017. Having never observed duty to recognize and bargain with the Union, such unilateral action was an unlawful violation of Section 8(a)(5) and (1).

The *Johnnie's Poultry* allegation

The General Counsel contends that Attorneys Harras and Heidecker's pretrial interview of employee witnesses, without providing them with the "specific safeguards designed to minimize the coercive impact of such employer interrogation," was violative of Section 8(a)(1) of the Act.

In *Johnnie's Poultry Co.*, 146 NLRB 770, 774–775 (1964), the Board held that "[d]espite the inherent danger of coercion," an interrogation of employees, for the purpose of investigating facts raised in a complaint or in preparation of a defense for trial may be permissible. However, an employer enjoys this privilege only so long as it follows "established specific safeguards designed to minimize the coercive impact of such employer interrogation":

> Thus, the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees. When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege.

Johnnie's Poultry, 146 NLRB at 775 (footnotes omitted).

With the exception of extraordinary circumstances, the Board strictly follows these rules. *WXGI, Inc.*, 330 NLRB 695, 712 (2000), enfd. 243 F.3d 833 (4th Cir. 2001).

While the safeguards are not required for all types of employee interviews, they must be "observe[d] in questioning employees with regard to . . . preparation of a defense to an unfair labor practice charge." *Pacific Southwest Airlines, Inc.*, 242 NLRB 1169, 1170 fn. 4 (1979); *Anserphone, Inc.*, 236 NLRB 931 (1978) ("An employer may ascertain facts necessary to its defense from employees if among other things it assures them that no reprisals will take place and obtains their participation on a voluntary basis").

Failure to provide the necessary assurances violates the Act, "irrespective of the employer's intent to coerce, the extent of the questioning or number of employees so interrogated, or the remoteness of the interrogation to the alleged unlawful conduct." *Kyle & Stephen*, Inc., 259 NLRB 731 (1981) (even questioning that is "isolated, inconsequential . . . and of no impact on the principal allegations of the complaint" violates Act in absence of safeguards).

In this case, the Respondent's counsel observed none of the required safeguards. They interviewed the employees about the employment application process, "how the supervisors treated us . . . when we appl[ied] for work," and about what occurred in their interviews in which they were hired. Employees were questioned about the same matters to which they later would be testifying. The lawyers posed questions to the employees and the employees answered these questions, albeit with none of the safeguards that the Board relies on to protect the employees in this situation.

This is a straightforward violation of the Board's rules established in *Johnnie's Poultry*, supra. The issues in this case directly involve the employees' Section 7 rights to have union representation and their right to be hired notwithstanding their prior union activity. The attorneys asked repeated questions about the hiring process that is a central issue in this case. Notably, this is not a situation where the attorney/employee meeting did not involve questioning of employees. To the contrary, the purpose of the meeting was to question employees. See, *Sutphin Car Wash*, 365 NLRB No. 106, slip op. at 1 fn. 2 (2017) (affirming dismissal of *Johnnie's Poultry* violation "based on testimony that the [manager] did not ask employees any questions at the . . . meeting").

The Respondent's defense of what it admits (R. Amend. Br. at 37) are "essentially undisputed" events, is without force. First the Respondent claims that the safeguards were not required because the attorneys represented the Fareri companies, and at the time of the meeting the employees no longer worked for Fareri, but were employees of the Fareri subcontractor, IBM. The Respondent contends (R. Amend. Br. at 38) that "[s]uch interviews are inherently non-coercive because the interviewers have no power to threaten or take employment action against the witnesses."

This is a meritless defense, particularly so in the circumstances of this case. Respondent's attorneys are not permitted to unlawfully interrogate *any* statutory employees. Certainly, the safeguards must extend to the Respondent's former employees being interviewed about events that occurred when they were employees—else employers could avoid the safeguards by discharging employees before interviewing them. See, *Freeman* Decorating Co., 336 NLRB 1, 14 (2001), enfd. denied on other grounds, 334 F.3d 27 (D.C. Cir. 2003). That hypothetical is not all so far afield, as the employees subject to the interviews in this case were former and not current employees only because the Respondent had unlawfully—albeit without

proven animus—subcontracted their jobs to the third party. Finally, the suggestion that the "interviewers have no power to threaten or take employment against the witnesses" because they are not directly employed by the Respondent is rich coming from a party that defended the termination of its own employees on the grounds—albeit false grounds—that the terminations were sparked by third-party tenant complaints. Fareri still owns and leases the buildings where these employees work, and still manages the property. The suggestion that Fareri would be powerless, or that employees would reasonably believe Fareri to be powerless to provoke employment action against them because they now clean the GOP under a contract between Fareri and IBM is not convincing.

Second, the Respondent claims that "the workers were told that their participation was voluntary." This is an overstatement to the point of falsity. One employee, Virginia Cruz, testified that she was told the meeting was voluntary by Roldan prior to the meeting. The other employee at the meeting who testified about it, Gonzalez, testified that he was not given an option not to participate and no one was told in the meeting with the attorneys that the meeting was voluntary. In any event, assuming, arguendo, this one safeguard was provided, does not make up for the fact that none of the others were. The Respondent asserts on brief that "[t]he implication was that there would be no retaliation for refusal to participate." There is no basis in the record for finding that this was implied.

Third, the Respondent contends that "none of the workers who attended the meeting testified that they felt restrained or coerced in the exercise of their section 7 rights in any way." This is neither part of the General Counsel's burden of proof nor an element of the violation.[66]

Finally, the Respondent complains that the

> General Counsel is treating the August 2018 meeting as if it is a *per se* violation of § 8(a)(1) of the Act. This is simply not the law. In the absence of threatening or coercive words or context, there is no violation.

This is wrong. When an employer questions employees in preparing for a Board hearing then the safeguards are required and the failure to provide them is inherently coercive. *Johnnie's Poultry* expressly holds that if its "specific safeguards" are not met, a violation occurs. 146 NLRB at 775; *Tschiggfrie Properties, LTD*, 365 NLRB No. 34, slip op. at 2 (2017), enfd. denied, 896 F.3d 880 (8th Cir. 2018).

It is true that, while the Board holds that compliance with all *Johnnie's Poultry* safeguards is a minimum requirement to avoid liability, the Board recognizes that some courts do not apply a "per se" rule in *Johnnie's Poultry* cases, but rather, examine the totality of the circumstances in determining whether the interview is coercive. *Wisconsin Porcelain, Co.*, 349 NLRB 151, 153 fn. 11 (2007). However, here, application of a totality-of-circumstances test also would result in a

[66]With regard to an interrogation, "[i]t is well settled that in evaluating the remarks, the Board does not consider either the motivation behind the remarks or their actual effect. *Miller Electric Pump & Plumbing*, 334 NLRB 824, 825 (2001); *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998). Rather, "the basic test for evaluating whether there has been a violation of Section 8(a)(1) is an objective test, i.e., whether the conduct in question would reasonably have a tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and not a subjective test having to do with whether the employee in question *was actually intimidated*." *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000) (Board's emphasis), enfd. 255 F.3d 363 (7th Cir. 2001).

finding of a violation. Given that the interview was conducted with a group of employees, in the presence of a supervisor, in buildings owned and managed by the Respondent, under circumstances that indicate at least some employees were compelled to attend, where no assurances of nonreprisal were given, and the subject matter of the questioning was inextricably related to the unlawful hiring efforts of the Respondent, I would find the interview unlawful under a totality-of-circumstances standard.

Julio Roldan's supervisory and agency status

The Respondent denied in its answer and, despite much evidence adduced at hearing refused to admit (Tr. 834–835), that Julio Roldan was an agent or supervisor under the Act.

Section 2(11) of the act defines a supervisor as:

> [A]ny individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Although I detected efforts by Roldan and Hernandez to shade much of their testimony in support of the Respondent's litigation position that Roldan was not a supervisor, I believe that his status as a statutory supervisor was amply proven by the General Counsel.

Roldan was hired by Hernandez at the outset "with the intention of making him a supervisor" and to "help him to run the building cleaning." Hernandez had no experience cleaning buildings, and he relied upon Roldan, who brought 25 years of managerial office cleaning experience, including assigning work to cleaners and making sure that workers properly cleaned their areas. Thus, according to Hernandez, from the outset he "appoint[ed] him as a supervisor," with "authority to assign work to employees as supervisor," and paid him $14 an hour, which was quickly raised to $17 an hour in a matter of days—again because of his supervisory status—while the cleaners made $10 an hour. The cleaners worked for Brenwood Hospitality—Roldan worked for GPS. While Hernandez worked about 20 hours a week at GOP, Roldan estimated that he worked 70–90 hours a week, including mornings and weekends when Hernandez was not present. Hernandez's testimony is clear that, in his view, Roldan was a supervisor from the outset, including specifically the evening of the November 7 encounter with the former AffinEco employees who came to Building 2 seeking work. Moreover, Roldan was identified on the Respondent's payroll records as a supervisor. See, GC Exh. 37 at 2.

However, Roldan's supervisory status is not simply a product of Hernandez' and the Respondent's documented understanding that he was hired to be supervisor. To begin with, it is undisputed that every weekend Roldan was the sole supervisor and possessed authority to give orders, assign, discipline (Tr. 829), approve employee timesheets, including overtime, signing off as supervisor (GC Exh. 48), and directed the work of the seven or eight employees—nearly ¼ of the full complement of employees who worked every weekend. Indeed, the weekend work involved long days for employees and their supervisor—Roldan worked about 30 hours a weekend, some employees regularly worked 16 hours a weekend—and thus, composed a significant portion of the total work performed by the Respondent at GOP. Roldan was indisputably a statutory supervisor during this period.

But even during the week the evidence of Roldan's supervisory status is compelling. First of all, he was the only supervisor present during many weekday mornings, while Hernandez was at J House. However, even during the evening cleaning work, Roldan demonstrated indicia of supervisory status. During the week, Roldan and Hernandez would split up the seven buildings and each supervise the work in 3 to 4 buildings—rotating the buildings they each supervised. Hernandez admitted that the supervision of the buildings was rotated between them. (Tr. 828–829). As early as the first week, neither Hernandez nor Roldan did the cleaning, rather, they inspected the work the cleaners did. If an area was not properly cleaned, Roldan had the responsibility to direct the cleaner to clean it again and show the cleaner how to do it—although the first week they were so far behind because of the dearth of employees that he would sometimes have to fix the cleaning problems himself. He had authority to approve time sheets and sometimes did so. (Tr. 833). Roldan had authority to speak to tenants about issues they raised, field tenant complaints, and had authority to deal with any of the issues the tenants raised.[67]

Roldan claimed that he no authority to hire until months into the job, but the record contradicts this claim. Thus, Virginia Cruz (hired November 8) and Miguel Gonzalez (hired November 10)—both witnesses called by the Respondent—testified that they were hired solely by Roldan, who interviewed them and hired them immediately. They were not hired by Hernandez. After their hire, Roldan assigned Cruz and Gonzalez to their work sites and they began their work based on his instructions. Roldan also testified that he made the decision to hire Irma Arango, at the request of a tenant, and on his own authority, sought and obtained approval from GPS Property Manager Christian Bilella to pay Arango at a special rate of $14 an hour. The tenant was unhappy with the cleaners who had cleaned her business in November. In early December, she complained to Roldan who solved the problem by bringing back Arango (and apparently transferring the other cleaner) whom the tenant had liked when she cleaned under AffinEco. Roldan contacted Arango, offered her the job, met with her when she came to GOP to review the job, and hired her after she returned home and considered the job and called Roldan to accept. In addition, upper management—Sheskier—volunteered in his testimony that Roldan was paid so much more than the rank-and-file cleaners in part because "he was involved in the hiring of the people that were there at the spot. [i.e., the GOP]."

If this were not enough, It is also clear that Roldan possessed nearly all of the typical "secondary indicia" of a supervisor. He was viewed as a supervisor by the employees, spent a significant amount of time in the supply room that he and Hernandez used as an office, formally worked for a different employer than the cleaners (GPS instead of Brenwood), received a significantly higher wage than the cleaners ($17 an hour vs. $10 an hour), and the ratio of supervisors to employees also suggests his supervisory status.

I find that Roldan is and at all relevant times was a statutory supervisor. He is also a statutory agent. Based on the foregoing, "employees would reasonably believe that [Roldan] was . . . acting for management." *Waterbed World*, 286 NLRB 425, 426-427 (1987).

[67]Pia introduced Roldan, along with Hernandez, to all the tenants, provided them with contact information for both of them, and tenants were instructed to communicate any problem with cleaning to Roldan and Hernandez. Roldan testified that the tenants were told "[t]hat I was going to be there in the morning and in the evening with Raul."

Single Employer

The General Counsel and Union allege that the four individual respondents constitute a single-employer under the Act's precedents, and therefore are jointly and severely liable for the unfair labor practices found.

"[I]n determining the relevant employer, the Board considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise." *Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965). A single-employer analysis is appropriate where two ongoing businesses are coordinated by a common master. See, *APF Carting, Inc.*, 336 NLRB 73 fn. 4 (2001) (citing *NYP Acquisition Corp.*, 332 NLRB 1041 fn. 1 (2000), enfd. 261 F.3d 291 (2d Cir. 2001)). "Stated otherwise, the fundamental inquiry is whether there exists overall control of critical matters at the policy level." *Emsing's Supermarket, Inc.*, 284 NLRB 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989) (footnotes omitted).

"The controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership." *Radio and Television Broadcast Technicians*, 380 U.S. at 256; *Flat Dog Productions, Inc.*, 347 NLRB 1180, 1181–1182 (2006) ("In determining whether two entities constitute a single employer, the Board considers four factors: common control over labor relations, common management, common ownership, and interrelation of operations"); *Emsing's Supermarket*, Inc., 284 NLRB 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989).[68]

However, "[n]o single factor in the single-employer inquiry is deemed controlling. *Flat Dog Productions, Inc.*, 347 NLRB at 11181-1182). Nor do all of the factors need to be present in order to support a finding of single-employer status. *Traco*, 363 NLRB No. 39, slip op. at 1 fn. 3 (2015) ("As the judge correctly noted, the Board considers four factors in determining whether two or more entities constitute a single employer, but does not require that all four factors be present"); *Flat Dog*, 347 NLRB at 1182; *Bolivar-Tees, Inc.*, 349 NLRB 720, 722 (2007), enfd. 551 F.3d 722 (8th Cir. 2008); *RBE Electronics*, supra. "Rather, single-employer status depends on all the circumstances, and is characterized by the absence of the arm's-length relationship found between unintegrated entities." *Dow Chemical Co.*, 326 NLRB 288 (1998).

In this case, all four of the Board's criteria are satisfied. The evidence strongly supports the conclusion that the four respondents constitute a single employer.

First, the common ownership of the four respondents is stipulated and undisputed: John Fareri owns 100 percent of three of the four entities and 85 percent of GPS (his daughter owns the rest). Thus, the common ownership factor is easily satisfied.

Second, there is common management. John Fareri's interest in the four Respondents is not as a passive owner. He is the principal or ultimate decisionmaker for each of the Respondents and possesses the authority to veto any of the decisions made by individual managers of the entities. The record shows that he was a chief decisionmaker in the decision not

[68]The Board has held that the factors of common control over labor relations, common management, and interrelation of operations are "more critical" than the factor of common ownership or financial control, and that "centralized control of labor relations is of particular importance because it tends to demonstrate 'operational integration."' *RBE Electronics of S.D.*, 320 NLRB 80, 80 (1995).

to use a third party contractor to clean the GOP, and the decision to "utilize the resources on hand"—i.e., the Fareri-owned and controlled Brenwood Hospitality—to provide cleaners for the GOP. Fareri personally solicited Brenwood's Director of Housekeeping Hernandez to add to his work (without increase in pay) the significant new task of staffing, operating, and managing a cleaning operation at the GOP that Fareri had just acquired. Further, the property managers at GPS—first Kelly Pia, and then Christian Bilella—report directly to Fareri, as does Jenereaux, a property manager for other Fareri-owned properties. Meanwhile, the J House general manager, a Brenwood employee, like Hernandez, also reports to Fareri.

Chris Sheskier acted as CFO for all four entities, overseeing and managing the financial aspects of all four entities from the address common to three of the four respondents, 2 Dearfield Avenue. (Brenwood's address is at J House, but Sheskier can perform his work for Brenwood from his offices at 2 Dearfield by electronically accessing the necessary records). As CFO, Sheskier oversaw and was ultimately responsible for a broad range of management-level functions for all four entities including overseeing all financial aspects, securing funding, ensuring accuracy of financial reports, budgeting, and acquisitions. In addition, Sheskier oversaw with "dotted line oversight from a financial point of view" the managers at Brenwood and GPS (the only respondents with employees) on all financial-related issues. This included supervising property managers Pia, Bilella, and Jenereaux at GPS, and human resources manager Simon who is employed by Brenwood.

The extensive roles played by both Fareri and Sheskier in upper management across all entities demonstrate common management of the enterprises that supports a finding of single employer status. *Flat Dog Productions, Inc.*, 347 NLRB 1180, 1182 (owner's extensive role as CEO and CFO for entities demonstrates common management); *Royal Typewriter Co.*, 209 NLRB 1006, 1010–1011 (1974) ("Thus, although the various divisions may have nominally separate management, it is clear that real authority over all divisions is in the hands of high officials . . . . In our view, the exercise of authority by these officials is sufficient to show common management"), enfd. 533 F.2d 1030 (8th Cir. 1976).

The Respondent's suggestion that the maintenance of separate lower-level supervisory or management employees at GPS and Brenwood insulates it from a single-employer finding is completely wrong. Control of day-to-day operations is not required. *Bolivar-Tees, Inc.*, 349 NLRB at 721. The issue is not whether there is any separate managers at all but "whether there exists overall control of critical matters at the policy level." *Emsing's Supermarket, Inc.*, 284 NLRB 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989) (footnotes omitted). John Fareri and Sheskier provide this policy level control over all the Respondents.

Third there is interrelation of operations. Indeed, the record is clear that interrelation of operations is part of the business model. The GOP was purchased by Greenwich Park, managed by GPS, with cleaning labor supplied under the auspices of Brenwood Hospitality. Greenwich Park paid for the cleaning supplies that were used by the Brenwood cleaners working at GOP. The entities were operated from the same corporate address—with the exception of Brenwood, which was housed at the hotel, but, notably, the hotel's employee handbook provided employees with a "Who's Who" section that included "Names to know at Fareri Associates" listing John Fareri and Sheskier, who is identified as the CFO for Fareri Associates."

Fareri, Sheskier, and Pia, using Fareri Associates emails negotiated and investigated the cleaning services for the new office park that was being bought. Salaries of GPS accountants and managers allocated to the work at the GOP were reimbursed by Greenwich Park. As noted, Sheskier served as CFO for all four respondents, and Vitti, before he retired, as controller for all

respondents, a factor that supports a finding of interrelation of operation. *Rogan Brothers Sanitation, Inc.*, 362 NLRB 547, 550 (2015) ("Kassman's role in both companies [as comptroller] further demonstrates the interrelatedness of their operations"), enfd. 651 Fed. Appx. 34 (2d Cir. 2016).

At trial, Sheskier explained extensive documentation of management fees and other reimbursements paid by Greenwich Park to GPS or to Brenwood. Brenwood's payroll expenses for the cleaners are reimbursed by Greenwich Park. GPS pays for all expenses related to the operation of GOP's operations, and Greenwich Park then reimburses GPS for these expenses, which include building supplies, cleaning materials, management fees, and the salaries of employees, such as maintenance staff. To facilitate this reimbursement, the revenue derived from GOP tenants' rent is deposited into GPS' account and after GPS pays bills relating to the GOP facility the balance is transferred back to Greenwich Park.

Notably, as Sheskier testified, these companies "do not have budgets that are being adhered to, budgets that are being formulated to be matched against operations." In other words, Sheskier oversees the budgeting for all of the entities—they do not have separately adhered to budgets. Thus, the web of reimbursements, management fees, and allocations of GPS salaries to Greenwich Park may be fair or unfair, but there is no one in these interrelated entities that can negotiate them at arm's length on behalf of each entity. All of these reimbursements were decided by Sheskier or someone working on his behalf. For instance, given the interrelationship of the entities, Christian Bilella—who reports to Fareri and to Sheskier—is incapable of having an arms-length negotiation with anyone to negotiate the percentage of his salary that is going to be allocated for reimbursement by Greenwich Park to GPS for work by GPS employees for GOP.

As Sheskier pithily put it, "the upside of being a management company is you pay yourself." Of course, this is true when "you" are both the purchaser and the provider of services, as is the case here. Indeed, Greenwich Park has no employees, and the property managers at GPS (including the property manager of GOP, Christian Bilella) report to Sheskier and John Fareri. This strongly supports a finding of interrelated operations. *Rogan Brothers Sanitation, Inc.*, 362 NLRB at 551. As does the Respondent's operation of its entities "in such a manner that the exigencies of one would be met by the other," which the Board has held is a factor in establishing single employer as it shows that the entities operate at "less than an 'arm's length relationship.'" *Emsing's Supermarket, Inc.*, supra, 284 NLRB at 302.[69]

The Respondent's protestations (R. Amend. Br. at 15) that each of its entities has a different business purpose is an argument without relevance or force. That entities have a different business purpose is no bar to a finding of single employer status. *Three Sisters Sportswear Co.*, 312 NLRB 853, 863 (1993) (single-employer status found between real estate company and companies associated with the garment industry), enfd. mem. 55 F.3d 684 (D.C. Cir. 1995); *Lederach Electric, Inc.*, 362 NLRB at 62–63 (reversing judge's finding that absence of common business purpose undermined single employer status and finding single employer status between electrical contracting company and property rental management company); *Carnival Carting, Inc.*, 355 NLRB 297, 297, 300-301 (2010) (single-employer status found between trash removal company and building management company), enfd. 455 Fed. Appx. 20 (2d Cir. 2012).

[69]The Respondent falsely claims (R. Amend. Br. at 16) that its intra-entity dealings are "the same kind of relationship they have with other third-party vendors," but this is not remotely true. The Respondent's entities do not independently negotiate with each other and they cannot do so given the control that Sheskier and Fareri exercise over the decisions and managers of each entity.

In any event, I note that the business purpose of Greenwich Park and Fareri Associates (a property, a property management company, and a property development company) while different, obviously complement each other and interrelate quite naturally. The fourth, Brenwood, mainly operates a hotel, but the Respondent—i.e., John Fareri and Sheskier—chose to use Brenwood as the employer and manager of the cleaners at GOP.

Finally, there is significant evidence that labor relations was also commonly and centrally controlled. As noted, John Fareri has the ability to hire or fire any employee at any of the two entities (Brenwood and GPS) that have employees. He personally decided (with assistance from Sheskier), and assigned Hernandez, to hire and supervise the cleaners at GOP.

Notably, the extent of Fareri's power over and involvement in the labor arrangements at his companies was illustrated by the fact that the plan to use Brenwood Hospitality to clean the GOP was accomplished in a 15-20 minute conversation between Hernandez and Fareri, with no change in compensation for Hernandez for essentially taking on a second full job.

And of course, in terms of labor relations, as I have found, Hernandez and Roldan repeatedly made statements deeply implicating Fareri in the labor relations decisionmaking. For instance, they told employees that "the owner of the company doesn't want anyone with [a/the] Union," that they would "have to call Fareri to ask if they would hire us" because there was no longer a union at the GOP, that they could not hire employees on the evening of November 7 because "unfortunately they weren't able to reach Fareri," that "by orders of Mr. Fareri he did not want any employee hired from those that had worked previously to the company nor anyone that belonged to 32BJ, that it was "an order of Mr. Fareri" for employee Indiana Pena to "never return again" because she had belonged to 32BJ," and when terminating Maurad and Bravo-Affon told them that "they have a lot of pressure coming from the new boss."

These direct admissions of Fareri's personal involvement in the labor policies of the GOP—policies directly implicated by this case—leave no doubt that neither Brenwood Hospitality nor the GOP operated its labor relations independently from each other or from Fareri.[70]

Apart from Fareri, Sheskier's role and oversight in labor relations for the Respondents also shows the common and centralized control at play. Payroll for the cleaners at GOP was, like the payroll for all the companies (that have payroll) overseen by Sheskier. The payroll was actually managed—again for both GPS and Brenwood, including the hotel and the GOP, by human resources manager for the hotel, Ildiko Simon, who reports directly to the hotel's general manager, and to Sheskier. Before she retired in December 2016, the common payroll was done by Vitti, the controller for all the companies who reported to Sheskier. Since then, Simon has handled the payroll functions for both Brenwood and GPS (the only entities with employees) and submits payroll data to the payroll processor ADP, and has also issued checks from Brenwood and GPS to employees at GOP, including, in at least one case—Indiana Pena—a paycheck from GPS (GC Exh. 33) and a paycheck from Brenwood (GC Exh. 34). Simon also handled "new hire" letters and "sent any kind of employment letters and hours" to employees. In addition, after

[70]The Respondent's counsel also represented (Tr. 94) that Fareri was involved in the decision to contract out the cleaning work to IBM in July 2017, and accepted a recommendation from Bilella to award IBM the contract. Representations in an opening argument by counsel may be used as admissions. *Performance Friction Corp.*, 335 NLRB 1117, 1149 (2001); *Four B Corp.*, 325 NLRB 186, 191–192 (1997), enfd. 163 F.3d 1177 (10th Cir. 1998).

Hernandez hired an employee as a cleaner at GOP, Pia, who worked for GPS and reported directly to John Fareri and also to Sheskier, would handle the necessary paperwork for that individual.

Moreover, the centralized common control of labor relations is demonstrated by the employee handbooks used for Brenwood and GPS. The Brenwood handbook is titled and directed to hotel employees at J House, but the record demonstrates that the Respondent agreed it was applicable to the GOP cleaners (who, of course, were Brenwood employees). These handbooks bear significant similarity in style, format, and substance, which is not a coincidence. Both handbooks were updated at Sheskier's direction in 2016, after a meeting he conducted with Simon and then-Controller Vitti, and possibly Julie Fareri, John Fareri's daughter, for the purpose of directing them to update the handbooks. Sheskier suggested that the uniformity evidenced in the handbooks might have come from common internet searches done to update the books—but the similarities are more extensive than that. While the J House handbook contains an introductory section on the history of the property and some other text and sections applicable to hotels that the GPS handbook lacks, the common language and substance is unmistakable. (Compare GC Exh. 36 to R. Exh. 9.)[71] Indeed, both handbooks list for employees that John Fareri and Sheskier are "Names to Know"—in the GPS handbook they are listed as part of GPS, in the J House handbook they are listed as names to know at Fareri Associates. The final format of these handbooks was approved by Sheskier who testified that he was having them updated in response to demands of the insurance companies.

The centralized and common control of labor relations begins at the top—Fareri controls it all. Sheskier, playing roles for all four entities also was deeply enmeshed. Hernandez was the top onsite supervisors at GOP—he remained in charge of cleaners at both the hotel and at the GOP while carrying out his work. However, Hernandez also admitted that Pia and Bilella—GPS employees who report directly to John Fareri and Sheskier, had the authority to terminate employees. While Hernandez remained employed by Brenwood, he reported to GPS property manager PIa and then Bilella for all matters related to GOP. Meanwhile, Hernandez' two top assistants, Julio and Rolando Roldan are both employed by GPS. The interrelationship is deep and seamless.[72]

Notably, the Respondent's assertions that common control of labor relations cannot be shown because on a day to day level, Hernandez exercised most of the labor relations control without constant interference or involvement of others is simply wrong. "In assessing the appropriateness of single employer treatment, the fact that day-to-day labor matters are handled at the local level is not controlling." *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1043 (8th Cir. 1976) (and cases cited therein), enforcing 209 NLRB 1006 (1974); *Soule Glass and Glazing Co.*, 246 NLRB 792, (1979) ("Most important of all, however, is the undisputed fact, clearly revealed by a close examination of the record, that Charles Soule is the person who has and exercises the power to make the major decisions, including labor relations decisions, for the entire Soule complex," rendering the employer's maintenance of separate offices and crews not undermining to single employer finding), enfd. in relevant part, 652 F.2d 1055 (1981).

[71]Identical or substantially identically worded sections include, About this Handbook, Management Style, Equal Opportunity Employment, Sexual Harassment, substance abuse, solicitation and distribution, safety, computer/electronic communications, personnel files, medical insurance, and more.

[72]There is more. The entities used the same counsel, had the same insurance broker, and all of this was coordinated by Sheskier.

In sum, I find that there is significant evidence that the respondents share common ownership, common management, interrelationship of operations, and common labor relations. They constitute a single employer under the Act, and are joint and severally liable for the unfair labor practices found.

CONCLUSIONS OF LAW

1. The Respondents Fareri Associates, LP, Greenwich Park, LLC, Greenwich Premier Services Corp., and Brenwood Hospitality, LLC (collectively, the Respondent) constitute a single-integrated business enterprise and are a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party Service Employees International Union Local 32BJ (Union) is labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent at the Greenwich Office Park constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

   All service employees in any facility, excluding commercial office buildings under 100,000 square feet, in Westchester, Putnam, Dutchess, Rockland, Orange and Sullivan Counties in the State of New York and Fairfield County in the State of Connecticut.

4. The Respondent, in or about November 2016, coercively interrogated job applicants about their union affiliation at their previous employment, in violation of Section 8(a)(1) of the Act.

5. The Respondent, on or about, November 7, 2016, informed job applicants that the Respondent intended to discriminate in hiring based on their union affiliation at their previous employment, in violation of Section 8(a)(1) of the Act.

6. The Respondent, on or about November 14, 15, and 30, unlawfully informed employees that they could not continue employment with the Respondent because of their union affiliation at their previous employment, in violation of Section 8(a)(1) of the Act.

7. The Respondent, in or about November or December 2016, coercively interrogated employees about their union and other protected activities, in violation of Section 8(a)(1) of the Act.

8. The Respondent, in or about November or December 2016, coercively interrogated employees about the identity of other employees engaged in union and protected activities, in violation of Section 8(a)(1) of the Act.

9. The Respondent, in or about November or December 2016, coercively requested that employees report the identity of other employees who had engaged in union and protected activities, in violation of Section 8(a)(1) of the Act.

10. The Respondent, in or about August 2018, coercively interrogated employee witnesses in preparation for upcoming NLRB proceedings in violation of Section 8(a)(1) of the Act.

11. The Respondent, beginning on or about November 5, 2016, unlawfully discriminated by refusing to consider for hire or hire the following former employees of AffinEco because they were represented by the Union, in violation of Section 8(a)(3) and (1) of the Act: Favian Brito, Marcia Cordero, Elidel Garfias, Ivette Huguet, Joel Jacome, Marcela Jaramillo, David Narvaez, Sonia Osorio, Lucia Perez, Yolanda Revilla, Silvia Rios, Nestor Trivino, Rosa Vasquez, Regina Cruz, Miguel Gonzalez, Segundo Zuniga, Ana Elicea, Mayra Maurad, Rosalia Bravo-Affon, Indiana Pena, and Irma Arango.

12. The Respondent, on or about November 15, 2016, unlawfully terminated its employee Indiana Pena because she was a former AffinEco employee represented by the Union, in violation of Section 8(a)(3) and (1) of the Act.

13. The Respondent, on or about November 30, 2016, unlawfully terminated its employee Maya Maurad because she was a former AffinEco employee represented by the Union, in violation of Section 8(a)(3) and (1) of the Act.

14. The Respondent, on or about November 30, 2016, unlawfully terminated its employee Rosalia Bravo-Affon because she was a former AffinEco employee represented by the Union, in violation of Section 8(a)(3) and (1) of the Act.

15. The Respondent, since on or about November 5, 2016, by failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the above-described unit, violated Section 8(a)(5) and (1) of the Act.

16. The Respondent, since on or about November 5, 2016, by unilaterally setting initial terms and conditions of employment for unit employees without first giving notice to and offering to bargain with the Union about those initial terms and conditions, violated Section 8(a)(5) and (1) of the Act.

17. The Respondent, on or about July 1, 2017, by unilaterally contracting out the cleaning work typically performed by the bargaining unit without providing the Union notice or an opportunity to bargain over the contracting out decision, violated Section 8(a)(5) and (1) of the Act.

18. The Respondent, unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully and discriminatorily refused to consider for hire or hire Favian Brito, Marcia Cordero, Elidel Garfias, Ivette Huguet, Joel Jacome, Marcela Jaramillo, David Narvaez, Sonia Osorio, Lucia Perez, Yolanda Revilla, Silvia Rios, Nestor Trivino, and Rosa Vasquez, the Respondent shall offer these employees instatement in the positions for which they would have been hired absent the Respondent's' unlawful discrimination, or, if those positions no

longer exist, in substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any employees hired in their place. The Respondent shall make them whole for any loss of earnings and benefits suffered as a result of the Respondent's unlawful discrimination against them.

The Respondent, having unlawfully and discriminatorily refused to consider for hire or hire, but then having subsequently hired Regina Cruz, Miguel Gonzalez, Segundo Zuniga, Ana Elicea, Mayra Maurad, Rosalia Bravo-Affon, Indiana Pena, and Irma Arango, shall make them whole for any loss of earnings and benefits suffered as a result of the Respondent's unlawful discrimination against them.

The Respondent, having unlawfully and discriminatorily discharged Indiana Pena, Maya Maurad, and Rosalia Bravo-Affon, shall reinstate them to their former jobs or, if their positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privilege previously enjoyed. The Respondent shall make them whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful discrimination against them.

Backpay for the make whole remedy described above shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondents shall also be required to expunge from their files any reference to the unlawful refusals to hire, unlawful delay in hiring, and unlawful discharge of the employees listed above in the preceding paragraphs and to notify the discriminatees in writing that this has been done. In accordance with the Board's decision in *King Soopers*, Inc., 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), the Respondent shall compensate the discriminatees for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate the discriminatees for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey*, Inc., 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 1 a report allocating backpay to the appropriate calendar year for each of the discriminatees The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

The Respondent, having unlawfully refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees, shall recognize the Union and, upon request bargain in good faith with the Union as their employees' exclusive collective-bargaining representative concerning their wages, hours, benefits and other terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement.

The Respondent having unlawfully unilaterally established the initial terms and conditions of employment for unit employees without first giving notice to and bargaining with the Union about those initial terms and conditions, shall rescind any changes from the terms and conditions in employment that existed immediately prior to the Respondent's takeover of the cleaning work at the GOP, retroactively restoring preexisting terms and conditions of employment, including

wage rates and contributions to benefit plans, until it negotiates in good faith with the Union to agreement or to a valid impasse.

The Respondent having unlawfully unilaterally contracted out the cleaning work typically performed by the bargaining unit without providing the Union notice or an opportunity to bargain over the contracting out decision, shall reinstate the unit work until it negotiates in good faith the Union to agreement or to a valid impasse.

Further, the Respondent shall make the unit employees whole (including the discriminatees described above) for any losses caused by the Respondent's failure to apply the terms and conditions of employment that existed for cleaners immediately prior to its takeover of the cleaning work at the GOP, and for its unilateral contracting out of the bargaining unit's cleaning work, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizon*, supra, and compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent shall also remit all payments it owes to employee benefit funds in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979), and reimburse its employees for any expenses resulting from the Respondent's failure to make such payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.[73]

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate any employees adversely affected by the unlawful unilateral changes for the adverse tax consequences, if any, of receiving lump sum backpay awards, and file with the Regional Director for Region 1 a report allocating the backpay awards to the appropriate calendar year for each employee.

The Respondent shall post an appropriate informational notice, in both English and Spanish, as described in the attached appendix. This notice shall be posted in the Respondent's facility wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 5, 2016. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 1 of the Board what action it will take with respect to this decision

As part of the remedy, the complaint seeks an order requiring that at a meeting or meetings scheduled to ensure the widest possible attendance, the Respondent's representative John J. Fareri read the notice to the employees in English and Spanish on work time in the presence of a Board agent and in the presence of the Respondent's supervisors and agents,

[73]The question of whether the Respondent must pay any additional amounts into any of the benefit funds to which it would have been required to contribute had it not unlawfully changed the terms and conditions of employment in order to satisfy the "make whole" remedy is appropriately left to the compliance stage. *Merryweather Optical Co.*, supra.

including Christopher Sheskier, Christian Bilella, Kelly Pia, Raul Hernandez, and Julio Roldan. Alternatively, the General Counsel seeks an order requiring the Respondent to have a Board agent read the notice to employees during work time in the presence of the Respondent's supervisors and agents including Fareri, Sheskier, Bilella, Pia, Hernandez, and Roldan.

The Board has held that in determining whether additional remedies are necessary to fully dissipate the coercive effect of unlawful discharges and other unfair labor practices it has broad discretion to fashion a remedy to fit the circumstances of each case. *Pacific Beach Hotel*, 361 NLRB 709, 710–711 (2014); *Excel Case Ready*, 334 NLRB 4, 5 (2001). In this regard, the Board has held that a public reading of the notice is an "effective but moderate way to let in a warming wind of information, and more important, reassurance." *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003) citing *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 539–540 (5th Cir. 1969). The Board has recognized that this remedy is warranted "where the violations are so numerous and serious that the reading aloud of a notice is considered necessary to enable employees to exercise their Section 7 rights in an atmosphere free of coercion, or where the violations in a case are egregious." *Postal Service*, 339 NLRB 1162, 1163 (2003).

In the instant case, I find that the unfair labor practices of the Respondent justify the additional remedy of a notice reading. The violations are egregious. The Respondent brazenly denied not just union representation but also employment to 13 employees, and unlawfully terminated three more. This misconduct must be considered the centerpiece of its violations, and is, obviously, highly coercive conduct. But in addition, this unlawful conduct occurred in the context of multiple instances of unlawful announcements to employees that their union status with AffinEco eliminated their hiring prospects, threats and unlawful interrogation, and efforts to ferret out former AffinEco employees who may have slipped through. It is not without reason that the record demonstrates that former AffinEco employees felt compelled to hide the fact of their former employment when individually seeking work at the GOP from the Respondent. Moreover, the small size of the unit, and the fact that the majority of the current unit employees (once the instatement and reinstatement remedies are observed) were the victims of discrimination and/or unlawful threats or interrogation, only compounds the need for a notice reading remedy. Finally, the fact that the highest ranking official of the Respondent—the owner and guiding force for all of the respondent-entities, John Fareri—was proven to be deeply involved in the Respondent's discriminatory conduct, militates for a remedy that includes public reading. *North Memorial Health Care*, 364 NLRB No. 61, slip op. at 1 (2016) (notice-reading appropriate in part due to participation of high-ranking management officials in unfair labor practices), enfd. in relevant part 860 F.3d 639 (8th Cir. 2017). Notably, most of the major actors in the Respondent's misconduct—from Fareri to Hernandez—remain employed by the Respondent. *Sysco Grand Rapids, LLC*, 367 NLRB No. 111, slip op. at 2 (2019) ("Reassurance to employees that their rights under the Act will not be violated by the Respondent is particularly important because it continues to employ its president[s] . . . remains president[s] . . . with corporate responsibility for the facilities involved herein; both were personally and directly involved in unlawfully threatening the employees"). In these circumstances, I find a public reading of the remedial notice is appropriate "to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices," and to allow the employees to "fully perceive that the Respondent and its managers are bound by the requirements of the Act." *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007) (and cited cases), enfd. mem. 273 Fed. Appx. 32 (2d Cir. 2008).[74]

[74]Given that, by all evidence, Kelly Pia left the employ of the Respondent in December 2016, I will not include her in the order as a manager required to be present for the reading of the notice.

As noted above, the Board has broad discretion in terms of fashioning an appropriate remedy. Although the General Counsel did not specifically request a broad cease-and-desist order as a remedy, I find that the Respondent has engaged in such egregious and widespread misconduct so as to demonstrate a general disregard for employees' statutory rights. I will, therefore, recommend issuance of a broad order requiring the Respondent to refrain from violating the Act "in any other manner," instead of a narrow order to refrain from engaging in conduct violative of the Act "in any like or related manner." *Hickmott Foods*, 242 NLRB 1357 (1979). The Board has noted that a broad order can be appropriate even when a respondent has not been shown to have committed prior violations of the Act, when the conduct engaged in is egregious or widespread. *Federated Logistics & Operations*, supra at 258 fn. 9. That is the case here, where the misconduct was demonstrated to emanate from the highest official and owner of the Respondent and carried out with cooperation of multiple lower level officials of the Respondent. *Sysco Grand Rapides, LLC*, 367 NLRB No. 111, slip op. at 1–2 (2019) (broad cease-and-desist order warranted in part based on fact that much of the misconduct was perpetrated by high-level management officials, including the respondent's president). Indeed, the directness and brazenness with which the Respondent undertook the discrimination in this case is striking. It simply evaded and avoided the Union and the former employees. While the evidence demonstrated that the unlawful conduct was perpetrated by the highest ranking official of the Respondent, at trial its defense amounted to blaming everything on Hernandez, who himself, had absolutely no plausible explanation for his failure to hire the former AffinEco employees. There is contempt in this Respondent's conduct not only for the rights of employees, but for the Act itself.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[75]

ORDER

The Respondents Fareri Associates, LP, Greenwich Park, LLC, Greenwich Premier Services Corp., and Brenwood Hospitality, LLC, a single employer (collectively, the Respondent), Greenwich, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating job applicants about their union affiliation at their previous employment.

(b) Informing job applicants that it intends to discriminate in hiring based on their union affiliation at their previous employment.

(c) Informing employees that they cannot continue their employment because of their union affiliation at their previous employment.

(d) Coercively interrogating employees about their union and other protected activities.

(e) Coercively interrogating employees about the identity of other employees engaged in union and protected activities.

[75]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(f) Coercively requesting that employees report the identity of other employees who have engaged in union and protected activities.

(g) Coercively interrogating employee witnesses in preparation for upcoming NLRB proceedings.

(h) Refusing to consider for hire or hire employees because they were represented by a union in their previous employment.

(i) Terminating employees because they were represented by a union in their previous employment.

(j) Failing and refusing to recognize and bargain with the Service Employees International Union, Local 32BJ (Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(k) Unilaterally establishing initial terms and conditions of employment without bargaining collectively with the Union to agreement or impasse.

(l) Unilaterally contracting out bargaining unit work without providing the Union with notice and an opportunity to bargain.

(m) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, offer Favian Brito, Marcia Cordero, Elidel Garfias, Ivette Huguet, Joel Jacome, Marcela Jaramillo, David Narvaez, Sonia Osorio, Lucia Perez, Yolanda Revilla, Silvia Rios, Nestor Trivino, and Rosa Vasquez, instatement in the positions for which they would have been hired absent the Respondent's' unlawful discrimination, or, if those positions no longer exist, in substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any employees hired in their place.

(b) Within 14 days of this order, offer Indiana Pena, Maya Maurad, and Rosalia Bravo-Affon, full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

(c) Make Favian Brito, Marcia Cordero, Elidel Garfias, Ivette Huguet, Joel Jacome, Marcela Jaramillo, David Narvaez, Sonia Osorio, Lucia Perez, Yolanda Revilla, Silvia Rios, Nestor Trivino, Rosa Vasquez, Indiana Pena, Maya Maurad, Rosalia Bravo-Affon, Regina Cruz, Miguel Gonzalez, Segundo Zuniga, Ana Elicea, and Irma Arango, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(d) Compensate Favian Brito, Marcia Cordero, Elidel Garfias, Ivette Huguet, Joel Jacome, Marcela Jaramillo, David Narvaez, Sonia Osorio, Lucia Perez, Yolanda Revilla, Silvia Rios, Nestor Trivino, Rosa Vasquez, Indiana Pena, Maya Maurad, Rosalia Bravo-Affon, Regina Cruz, Miguel Gonzalez, Segundo Zuniga, Ana Elicea, and Irma Arango, for the adverse tax consequences, if any, of receiving lump-sum backpay awards and file with the Regional Director for Region 1, within 21 days of the date the amount of back pay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(e) Within 14 days of the date of this order, remove from its files any reference to the unlawful refusal to consider or hire Favian Brito, Marcia Cordero, Elidel Garfias, Ivette Huguet, Joel Jacome, Marcela Jaramillo, David Narvaez, Sonia Osorio, Lucia Perez, Yolanda Revilla, Silvia Rios, Nestor Trivino, Rosa Vasquez, Regina Cruz, Miguel Gonzalez, Segundo Zuniga, Ana Elicea, Mayra Maurad, Rosalia Bravo-Affon, Indiana Pena, and Irma Arango, and any reference to the unlawful terminations of Indiana Pena, Maya Maurad, and Rosalia Bravo-Affon, and within 3 days thereafter, notify each of them in writing that this has been done and that the refusal to hire and/or the termination will not be used against them in any way.

(f) Recognize and, on request of the Union, bargain with the Union as the exclusive collective-bargaining representative of the employees in the Greenwich Office Park in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All service employees in any facility, excluding commercial office buildings under 100,000 square feet, in Westchester, Putnam, Dutchess, Rockland, Orange and Sullivan Counties in the State of New York and Fairfield County in the State of Connecticut.

(g) On request of the Union, rescind any changes from the terms and conditions in employment that existed immediately prior to the Respondent's takeover of the cleaning work performed by AffinEco at the Greenwich, Connecticut, Greenwich Office Park, retroactively restoring the preexisting terms and conditions of employment, including wage rates and benefit plans, until it negotiates in good faith with the Union to agreement or to impasse.

(h) On request of the Union, rescind its contracting out of the cleaning work typically performed by the bargaining unit, until it negotiates in good faith with the Union to agreement or impasse over the decision to contract out the unit cleaning work.

(i) Make the unit employees whole for any losses caused by the Respondent's failure to apply the terms and conditions of employment that existed for cleaners immediately prior to its takeover of the cleaning work at the GOP, and for its unilateral contracting out of the bargaining unit's cleaning work, in the manner described in the remedy section of this decision.

(j) Make all contributions to employee benefit funds that it failed to make due to its unlawful unilateral change in terms and conditions of employment, including any additional amounts due to the funds on behalf of unit employees in the manner set forth in the remedy section of this decision.

(k) Reimburse unit employees for any expenses resulting from the failure to contribute to employee benefit funds in the manner set forth in the remedy section of this decision.

(l) Compensate unit employees affected by the unilateral establishment in terms and conditions of employment and the unilateral contracting out of the unit's cleaning work for the adverse tax consequences, if any, of receiving lump-sum backpay awards and file with the Regional Director for Region 1, within 21 days of the date the amount of back pay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(m) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(n) Within 14 days after service by the Region, post at its headquarters at 2 Dearfield Avenue, Greenwich, Connecticut, at the Greenwich Office Park, and at the J House Hotel, in Greenwich, Connecticut copies of the attached notice marked "Appendix" in both English and Spanish.[76] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 5, 2016.

(o) Within 14 days after service by the Region, hold a meeting or meetings during work time, scheduled to ensure the widest possible attendance, at

[76]If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

which the attached notice marked "Appendix" is to be publicly read in English and Spanish on work time to the employees by John J. Fareri (or if he is no longer employed by the Respondent by an equally high-ranking management official) in the presence of Fareri, Christopher Sheskier, Christian Bilella, Raul Hernandez, and Julio Roldan, a Board agent and an agent of the Union, if the Union so desires, or, at the Respondent's option, by a Board agent in the presence of Fareri, Sheskier, Bilella, Hernandez, and Roldan, and, if the Union so desires, an agent of the Union.

(p) Within 21 days after service by the Region, file with the Regional Director for Region 6 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 13, 2019

David I. Goldman
U.S. Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you about your union affiliation at your previous employment.

WE WILL NOT inform you that we intend to discriminate in hiring based on your union affiliation at your previous employment.

WE WILL NOT inform you that you cannot continue your employment because of your union affiliation at your previous employment.

WE WILL NOT interrogate you about your union or other activities protected by federal law.

WE WILL NOT interrogate you about the identity of other employees engaged in union and other activities protected by federal law.

WE WILL NOT request that you report the identity of other employees who have engaged in union or other activities protected by federal law.

WE WILL NOT coercively interrogate you in preparation for NLRB proceedings.

WE WILL NOT refuse to consider you for hire or refuse to hire you because you were represented by a union in your previous employment.

WE WILL NOT terminate you because you were represented by a union in your previous employment.

WE WILL NOT refuse to recognize and bargain collectively with your union, the Service Employees International Union, Local 32BJ (Union) as your exclusive collective-bargaining representative.

WE WILL NOT unilaterally establish initial terms and conditions of employment without bargaining collectively with the Union to agreement or impasse.

WE WILL NOT unilaterally contract out your work without providing the Union with notice and an opportunity to bargain.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL offer Favian Brito, Marcia Cordero, Elidel Garfias, Ivette Huguet, Joel Jacome, Marcela Jaramillo, David Narvaez, Sonia Osorio, Lucia Perez, Yolanda Revilla, Silvia Rios, Nestor Trivino, and Rosa Vasquez, instatement in the positions for which they would have been hired absent our unlawful discrimination in hiring, or, if those positions no longer exist, in substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL offer Indiana Pena, Maya Maurad, and Rosalia Bravo-Affon, full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

WE WILL make Favian Brito, Marcia Cordero, Elidel Garfias, Ivette Huguet, Joel Jacome, Marcela Jaramillo, David Narvaez, Sonia Osorio, Lucia Perez, Yolanda Revilla, Silvia Rios, Nestor Trivino, Rosa Vasquez, Indiana Pena, Maya Maurad, Rosalia Bravo-Affon, Regina Cruz, Miguel Gonzalez, Segundo Zuniga, Ana Elicea, and Irma Arango, whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them.

WE WILL compensate Favian Brito, Marcia Cordero, Elidel Garfias, Ivette Huguet, Joel Jacome, Marcela Jaramillo, David Narvaez, Sonia Osorio, Lucia Perez, Yolanda Revilla, Silvia Rios, Nestor Trivino, Rosa Vasquez, Indiana Pena, Maya Maurad, Rosalia Bravo-Affon, Regina Cruz, Miguel Gonzalez, Segundo Zuniga, Ana Elicea, and Irma Arango, for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL remove from our files any reference to the unlawful refusal to hire or consider Favian Brito, Marcia Cordero, Elidel Garfias, Ivette Huguet, Joel Jacome, Marcela Jaramillo, David Narvaez, Sonia Osorio, Lucia Perez, Yolanda Revilla, Silvia Rios, Nestor Trivino, Rosa Vasquez, Indiana Pena, Maya Maurad, Rosalia Bravo-Affon, Regina Cruz, Miguel Gonzalez, Segundo Zuniga, Ana Elicea, and Irma Arango, and any reference to the unlawful terminations of Indiana Pena, Maya Maurad, Rosalia Bravo-Affon and WE WILL within 3 days thereafter, notify each of them in writing that this has been done and that the refusal to hire and the delay in hiring and the termination will not be used against them in any way.

WE WILL recognize and on request of the Union bargain with the Union as the exclusive collective-bargaining representative of our employees in the Greenwich Office Park in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All service employees in any facility, excluding commercial office buildings under 100,000 square feet, in Westchester, Putnam, Dutchess, Rockland, Orange and Sullivan Counties in the State of New York and Fairfield County in the State of Connecticut.

WE WILL, on request of the Union, rescind any changes from the terms and conditions in employment that existed immediately prior to our takeover of the cleaning work performed by AffinEco at the Greenwich, Connecticut Greenwich Office Park, retroactively restoring the preexisting terms and conditions of employment, including wage rates and benefit plans, until we negotiate in good faith with the Union to agreement or to impasse.

WE WILL, on request of the Union, rescind our contracting out of the cleaning work typically performed by the bargaining unit employees, until we negotiate in good faith with the Union to agreement or impasse over the decision to contract out the unit cleaning work.

WE WILL make you whole for any losses caused by our failure to apply the terms and conditions of employment that existed for cleaners immediately prior to our takeover of the cleaning work at the GOP, and for our unilateral contracting out of the bargaining unit's cleaning work.

WE WILL make all contributions to employee benefit funds that we failed to make due to our unlawful unilateral change in terms and conditions of employment, including any additional amounts due to the funds on behalf of unit employees.

WE WILL reimburse you for any expenses resulting from our failure to contribute to employee benefit funds.

WE WILL compensate you for the adverse tax consequences, if any, of receiving lump-sum backpay awards and WE WILL file with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL hold a meeting or meetings during working hours and have this notice read in English and Spanish to you and your fellow workers by John J. Fareri, the owner of your employer (or if he is no longer employed by your employer by an equally high-ranking management official), in the presence of other managers and supervisors, a Board agent and an agent of the Union, if the Union so desires, or at our option, by a Board agent in the presence of other managers and supervisors and, if the Union so desires, in the presence of an agent of the Union.

FARERI ASSOCIATES, LP, GREENWICH PARK LLC, GREENWICH PREMIER SERVICES CORP., and BRENWOOD HOSPITALITY, LLC

(Employer)

Dated _____ By _____

(Representative)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

A. A. Ribicoff Federal Building and Courthouse, 450 Main Street, Suite 410, Hartford, CT 06103-3022
(860) 240-3522, Hours: 8:30 a.m. to 5 p.m.

Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-188158 by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (857) 317-7816.